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Federal Child Support Guidelines: Reference Manual

Guidance for Determining Income Under the Federal Child Support Guidelines

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*This article was commissioned by the Child Support Team,
Department of Justice Canada. The views expressed herein are
solely those of the author and do not necessarily represent the
views of the Department.*



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Federal Child Support Guidelines: Reference Manual

The Child Support Team, Department of Justice Canada, is pleased to provide you with the enclosed new articles, along with a revised table of contents. Please replace your present table of contents with the new one and insert the new articles in the following sections:

- "Guidance for the Determination of Income Under the Federal Child Support Guidelines" at the end of section G (Income); and
- "Facilitating Enforcement: The Federal Perspective" in section L (Enforcement).

The Child Support Team would like to thank everyone who responded to the consultation paper, *Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions*. As you may know, the Department will hold further consultations on child support in conjunction with consultations on custody and access in 2001. Reforming the family law system is part of the Government of Canada's overall commitment to promote positive outcomes for children and their families following a separation or divorce. The Department is presently working with provincial and territorial governments, that share jurisdiction in the area of family law, to develop proposals for those consultations.

As we value the input of our reference manual subscribers, we will be inviting you to participate in the upcoming consultations. Your comments on how the Guidelines are working and how they might be improved will help us when we consider whether to recommend changes. We hope that you will want to take part; however, if you do not wish to participate, please call our toll-free number at 1-888-373-2222 to request that your name be withdrawn from the consultation list.

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**Guidance for Determining Income Under
the Federal Child Support Guidelines**
By Vivian M. Alterman, CA, CBV

1.0 INTRODUCTION

The Federal Child Support Guidelines came into effect on May 1, 1997. Since then, the rules for determining income (sections 15 to 20 and Schedule III) have frequently been cited as an area of concern. This paper explains each section of the Guidelines that deals with the determination of income and addresses the rationale for each section and how each section should be applied.

2.0 SECTION 15: DETERMINATION OF ANNUAL INCOME

The spouses have two options for determining income.

1. Calculation—Subsection 15(1): The court determines the annual income using the specific rules set out in sections 16 to 20 of the Guidelines, which are described in parts 3, 5, 6 and 7 of this report.
2. Agreement—Subsection 15(2): Both spouses agree on annual income in writing for the purposes of determining a child support award. However, the court must be satisfied that this amount is reasonable after it has reviewed all of the required documentation supporting the spouse's income as specified in Section 21 of the Guidelines.

COMMENTARY

The first option, to determine the amount of the spouse's income by specific rules, is designed to reduce conflict and tension between the spouses by making the calculation of child support orders objective.

The second option, having the spouses agree on a spouse's income, is available to reduce conflict and tension between spouses and encourages efficiency and settlements when setting the levels of child support.

The court must approve the agreed upon amount to ensure consistent treatment of spouses and children who are in similar circumstances and to establish a fair standard of child support.

3.0 SECTION 16: CALCULATION OF ANNUAL INCOME

The starting point when calculating the spouse's annual income is his or her most recent federal income tax return. The figure on line 150 (Total Income) of the return includes income from all sources (e.g. employment income, pension income, interest and dividend income, business or professional income, and employment insurance and social assistance payments).

COMMENTARY

Subsection 2(3) of the Guidelines specifies that the most current information must be used when determining an amount for Guidelines purposes (MacDonald v. Rasmussen). In some cases, the spouse's most recent federal tax return will provide the most recent income information; however, in other cases, the most recent federal tax return and the Canada Customs and Revenue Agency notices of assessment and re-assessment may not be the best sources for current income information. For example, if a spouse's income has changed significantly recently, the income tax information may not be up-to-date, accurate or a fair reflection of income. If the tax information is not the most up-to-date, the spouses must use more current sources of information, such as pay stubs.

Section 16 stipulates that the spouses are to consider all the sources of income set out in the tax return when determining income. Section 16 does not say to use the amount disclosed on the tax return (Wilson v. Wilson).

In Lee v. Lee, the court stated that it is a person's projected annual income, not his or her historical income, that is to be used to calculate income for Guidelines purposes. Although past income serves as a basis to predict future income, child support is nevertheless payable from what the payer will earn, not from what he or she has earned in the past.

CASE CITATION

MacDonald v. Rasmussen, [1998] 4 W.W.R. 588, 34 R.F.L. (4th) 451, 161 Sask. R. 103, [1997] S.J. No. 677 (Sask. Q.B.)

Lee v. Lee (1998), 167 Nfld. & P.E.I.R. 176, 513 A.P.R. 17b, 165 D.L.R. (4th) 619, 43 R.F.L. (4th) 339 (Nfld. C.A.)

Wilson v. Wilson, [1998] 8 W.W.R. 493 (Sask. Q.B.)

4.0 SCHEDULE III

Schedule III of the Guidelines includes adjustments to a spouse's annual income to allow for a fairer determination of income.

4.1 SECTION 1: EMPLOYMENT EXPENSES

When a spouse is an employee, he or she may deduct from Total Income (line 150 of the federal income tax return) certain employment expenses, as described in the *Income Tax Act* (ITA) and noted below, when calculating annual income for the purposes of the Guidelines.

The brief summary of the deductible employment expenses that follows is intended to give readers an idea of the type of deductions that fall under this category. It is not comprehensive, nor does it replace a thorough interpretation of the ITA.

1. Clergyman's residence

Under ITA paragraph 8(1)(c), a member of a clergy may deduct from income the amount of rent he or she pays or an amount equal to the fair rental value of his or her living

accommodations. The amount deducted cannot exceed his or her remuneration from employment as a member of the clergy.

COMMENTARY

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please consult relevant excerpts on page 26 of the consultation paper.

2. Teacher's exchange fund

Under ITA paragraph 8(1)(d), a teacher may deduct from income an amount up to \$250 paid to a fund established by the Canadian Education Association to benefit teachers who come to Canada from Commonwealth countries on exchange.

3. Expenses of railway employees

Under ITA paragraph 8(1)(e), certain railway employees may deduct 50 to 80 percent of the cost of meals and lodging incurred while employed away from their ordinary place of residence. The deduction is limited to costs that the employer does not reimburse.

4. Sales expenses

Under ITA paragraph 8(1)(f), a salesperson who

- (a) is an employee;
- (b) receives remuneration during the year in whole or in part from commissions;
- (c) is required to pay his or her own expenses;
- (d) does not receive a tax exempt allowance from his or her employer; and
- (e) ordinarily performs his or her duties outside the employer's office

may deduct all expenses incurred while earning his or her commissions. The amount deducted cannot exceed the commissions received during the year, and only 50 percent of the food, beverage and entertainment expenses incurred may be deducted.

5. Transport employees' expenses

Under ITA paragraph 8(1)(g), certain employees of companies whose principal business is transporting passengers and/or goods (e.g. an airline or railway) and who

- (a) travel away from where their home terminal; and
- (b) travel on vehicles their employer uses to transport goods or passengers

are entitled to deduct the cost of their lodging and 50 percent of the cost of their food while away.

6. Travel expenses

Under ITA paragraph 8(1)(h), an employee who

- (a) is ordinarily required to work away from his or her employer's place of business or in different places;
- (b) is required by his or her employer to pay his or her own travel expenses; and
- (c) does not receive a travel allowance from his or her employer

may deduct all travel expenses incurred, except motor vehicle expenses (see commentary below).

COMMENTARY

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please consult relevant excerpts on page 27 of the consultation paper.

7. Dues and other expenses of performing duties

Under ITA paragraph 8(1)(i), certain expenses that the spouse's employer does not reimburse may be deducted from annual income, including the following:

- (a) annual professional membership dues;
- (b) dues to a professional board, party or advisory committee;
- (c) annual dues to maintain membership in a trade union;
- (d) office rent or salary to an assistant or substitute, paid for by the employee under the terms of his or her employment; and
- (e) the cost of supplies consumed that the employee provided and paid for under the terms of his or her employment.

8. Motor vehicle and aircraft costs

Under ITA paragraph 8(1)(j), an employee who may deduct travel expenses under paragraph 8(1)(f) [see 4, above] or 8(1)(h) [see 6, above] may also deduct

- (a) any interest paid in the year on money borrowed to buy an automobile or an aircraft used to earn employment income; and
- (b) any capital cost allowance on an automobile or an aircraft used to earn employment income.

9. Canada Pension Plan (CPP) contributions and Employment Insurance (EI) premiums paid on behalf of another employee who acts as an assistant to or substitute for the spouse.

Under ITA paragraph 8(1)(l.1), a spouse, who is an employee, may deduct the amount of CPP contributions and EI premiums he or she pays for another employee who is performing that spouse's duties of employment. The spouse may not deduct the premiums paid on his or her own behalf, however.

10. Salary reimbursement

Under ITA paragraph 8(1)(n), an employee may deduct the amount of salary that he or she paid back to the employer for time when the employee did not work. The amount of salary that may be deducted must not exceed the amount originally included in the employee's income.

11. Forfeited amounts

Under ITA paragraph 8(1)(o), an employee with a salary deferral arrangement may deduct any amount that he or she included in income but will never receive because the arrangement has been cancelled.

12. Musical instrument costs

Under ITA paragraph 8(1)(p), employed musicians who must have a musical instrument as a condition of employment may deduct from their employment income the cost of maintaining, renting and insuring that instrument. Musicians who own the instrument they use in employment may deduct part of the capital cost of the instrument.

13. Artist's employment expenses

Under ITA paragraph 8(1)(q), artists may deduct from income earned from artistic employment (described in detail in the ITA) any related expenses up to a maximum of

- (a) 20 percent of the artistic employment income; or
- (b) \$1,000, whichever is less,

minus any amounts claimed under other provisions of the ITA.

Amounts denied due to the limitations noted above may be carried forward against future artistic employment income.

COMMENTARY

In certain circumstances, an employee incurs non-reimbursable expenses due to the nature of his or her employment. These expenses, unlike the business expenses of a self-employed individual, are deducted from gross income to reduce Total Income for income tax purposes; however, they must be deducted from Total Income to determine a spouse's true income for Guidelines

purposes. The most common expenditures deducted by virtue of section 8 are travel expenses and professional, association or union dues.

4.2 SECTION 2: CHILD SUPPORT RECEIVED

Child support that a spouse receives and includes in Total Income on his or her personal income tax return must be deducted from that income for Guidelines purposes.

COMMENTARY

Example

Cindy's Total Income of \$25,000 includes \$2,000 in child support.

Cindy's income for Guidelines purposes is \$23,000, her Total Income of \$25,000 minus the \$2,000 in child support she receives.

Deducting any child support received ensures that these funds are not available to the spouse receiving them for making child support payments.

The amount of child and spousal support the spouse receives during the year is recorded on line 128 of the federal income tax return. A court order or written agreement will often set out how much of this amount is for child support and how much is for spousal support. If there is no such order or agreement, the spouses should agree on the portion that relates to child support. In Metzner v. Metzner, the mother's income consisted entirely of spousal and child support. The court concluded that the mother's income for purposes of determining the basic child support amount under the table was nil.

Section 2 deals only with deducting the child support from Total Income; subsection 3(1) lists the rules for deducting spousal support.

CASE CITATION

Metzner v. Metzner, [1997] B.C.J. No. 2903, 46 B.C.L.R. (3d) 149 (B.C. S.C.)

4.3 SUBSECTION 3(1): SPOUSAL SUPPORT RECEIVED

The amount of spousal support a spouse receives from the other spouse and includes in Total Income must be deducted when calculating the receiving spouse's income for purposes of determining the basic amount of child support from the child support tables.

COMMENTARY

The spousal support amount received from the paying spouse should be deducted only when calculating the receiving spouse's income to determine the basic amount of child support from the child support tables (Metzner v. Metzner and Moro v. Miletich).

Example

Michael and Annie have split custody of their two children. The younger child lives with Annie and the older child lives with Michael. Annie will pay child support to Michael for the child in his custody. Michael will pay child support to Annie for the child in her custody.

Annie's Total Income of \$30,000 includes spousal support of \$24,000. Annie's income for purposes of determining the amount of child support that she has to pay Michael is \$6,000, which is her Total Income of \$30,000 minus the \$24,000 in spousal support she receives.

The spousal support received from the other spouse should not be deducted from income under the following circumstances:

- *when calculating the amount of a spouse's income to determine his or her share of special and extraordinary expenses under Section 7 of the Guidelines; and*
- *when calculating the amount of a spouse's income to establish household standard of living.*

These rules are summarized in the chart below:

Purpose of Income Calculation	Spousal Support Received
Determine Basic Child Support Amount	Deduct
Determine Special and Extraordinary Expenses	Do Not Deduct
Determine Household Standard of Living	Do Not Deduct

CASE CITATION

Garrison v. Garrison, [1997] 160 Sask. R. 212, [1998] 4 W.W.R. 230, 34 R.F.L. (4th) 420 (Sask. Q.B.)

Krislock v. Krislock, [1997] 160 Sask. R. 212, [1998] 4 W.W.R. 230, 34 R.F.L. (4th) 420 (Sask. Q.B.)

Metzner v. Metzner, [1997] B.C.J. No. 2903, 46 B.C.L.R. (3d) 149 (B.C. S.C.)

Moro v. Miletich, [1998] 40 R.F.L. (4th) 115 (Ont. Gen. Div.)

4.4 SUBSECTION 3(2): SPOUSAL SUPPORT PAID

The spousal support the spouse pays to the other spouse must be deducted from Total Income when calculating his or her income to determine his or her share of special or extraordinary expenses under Section 7 of the Guidelines.

COMMENTARY

The spousal support paid to the other spouse must be deducted from the spouse's income under the following circumstances:

- *when calculating the spouse's income to determine his or her share of special and extraordinary expenses under Section 7 of the Guidelines; and*
- *when calculating the spouse's income to establish household standard of living.*

Example

Michael's Total Income is \$100,000. He pays Annie annual spousal support of \$24,000. Michael's income for determining the basic amount of child support from the child support tables is \$100,000 (i.e. he receives no deduction for the amount of spousal support he paid). However, Michael's income for determining his share of the special and extraordinary expenses is \$76,000, which is his Total Income of \$100,000 minus the spousal support of \$24,000 he pays Annie.

The spousal support amount paid must not be deducted when calculating the spouse's income to determine the basic amount of child support from the child support tables.

These rules are summarized in the chart below:

Purpose of Income Calculation	Spousal Support Paid
Determine Basic Child Support Amount	Do Not Deduct
Determine Special and Extraordinary Expenses	Deduct
Determine Household Standard of Living	Deduct

4.5 SECTION 4: SOCIAL ASSISTANCE

The amount of social assistance the spouse receives for *other* members of the household must be deducted from Total Income. Only the amount attributable to him or her is included in his or her income for the purposes of the Guidelines.

COMMENTARY

Example

Marsha's Total Income of \$12,000 includes social assistance income of \$7,000. \$5,000 of that amount is for the benefit of her children and the remaining \$2,000 is for her. Marsha's income for Guidelines purposes is \$7,000, which is her Total Income of \$12,000 minus the social assistance of \$5,000 she receives for her children.

In Chambers v. Chambers, the court included the full amount of the social assistance payment in the mother's income because the court did not have a breakdown of the portion of the social assistance that was attributable to the child that was living with her.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on page 27 of the consultation paper.

CASE CITATION

Chambers v. Chambers, [1998] 78 A.C.W.S. (3d) 1167 (N.W.T.S.C.)

Razavi v. Aavani (unreported, August 11, 1998, B.C.S.C.)

Stokes v. Stokes, [1998] 79 A.C.W.S. (3d) 576 (Sask. Q.B.)

Wilson v. Wilson, [1998] 78 A.C.W.S. (3d) 1175 (Sask. Q.B.)

4.6 SECTION 5: DIVIDENDS FROM TAXABLE CANADIAN CORPORATIONS

The taxable amount of dividends the spouse receives from taxable Canadian corporations is deducted from Total Income and replaced by the actual amount of those dividends.

COMMENTARY

Dividends from taxable Canadian corporations are reported and taxed differently than regular income. The dividend amount reported on the spouse's federal tax return is 125 percent of the actual dividend. Therefore, income for child support purposes must include the actual dividend amount not the taxable amount reported on the tax return.

Example

Line 120 of Cindy's federal income tax return shows that she earned taxable dividends from a taxable Canadian corporation of \$125,000. The actual amount of dividends received by Cindy was \$100,000 (calculated by dividing the amount of the taxable dividend (\$125,000) by 1.25). To determine Cindy's income for Guidelines purposes, the following adjustments must be made to her Total Income:

1. Deduct the taxable dividends of \$125,000; and
 2. Add the actual amount of dividends (\$100,000) received.
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CASE CITATION

Addison v. Dornian, [1998] 124 Man. R. (2d) 268, 36 R.F.L. (4th) 335, (sub nom. E.H.A. v. R.D.) [1998] M.J. No. 50 (Q.B.)
Wilson v. Wilson, [1998] 78 A.C.W.S. (3d) 1175 (Sask. Q.B.)

4.7 SECTION 6: CAPITAL GAINS AND CAPITAL LOSSES

The taxable capital gains a spouse realized in a year are deducted from Total Income and replaced by the actual amount of capital gains he or she realizes in excess of that year's capital losses.

COMMENTARY

Capital gains are reported and taxed differently than regular income. The amount of the capital gains reported on the spouse's federal tax return is 75 percent of the actual capital gains he or she received. However, the spouse benefits from the entire capital gain. Therefore, it is appropriate, when determining income for child support purposes, to include the actual capital gains and not the taxable capital gains reported on the tax return.

Example

Line 127 of Jason's federal tax return reports that he earned taxable capital gains of \$75,000. The actual amount of capital gains Jason received is \$100,000 (calculated by dividing the amount of taxable capital gains (\$75,000) by 0.75). To determine Jason's income for Guidelines purposes, the following adjustments must be made to his Total Income:

1. Deduct the taxable capital gains of \$75,000; and
2. Add the actual amount of capital gains (\$100,000).

When there are both capital gains and capital losses in a year, only the net taxable gain is required to determine Total Income for Guidelines purposes. This is because the calculation to determine net capital gains already takes into account capital losses. No further adjustment to Total Income is required for capital losses incurred in the year.

Example

Karen's Total Income includes taxable capital gains of \$75,000, which were calculated as follows:

		<i>Tax Return Reference</i>
Capital gains	\$ 200,000	
Capital losses	(100,000)	
Net capital gains	<u>\$ 100,000</u>	
Net taxable capital gains (x 75%)	<u>\$ 75,000</u>	<i>Line 127</i>

To determine Karen's income for Guidelines purposes, the following adjustments must be made to Total Income:

1. Deduct the net taxable capital gains of \$75,000; and
2. Add the net capital gains of \$100,000.

Karen's capital losses are offset against her capital gains in the calculation for net taxable capital gains. There is no further adjustment required to Total Income for the capital losses.

If capital losses exceed capital gains, the excess may be carried back to any of the prior three years and offset against capital gains in those years or carried forward and deducted from any capital gains incurred in any future year. The Guidelines allow an adjustment of only the capital losses utilized in the year.

Example

Shannon's 1999 Total Income includes net taxable capital gains of \$75,000, were calculated as follows:

		<i>Tax Return Reference</i>
Capital gains	\$ 200,000	
Capital losses carried forward from 1998 to 1999	<u>(100,000)</u>	
Net capital gains	<u>\$ 100,000</u>	
Net taxable capital gains (x 75%)	<u><u>\$ 75,000</u></u>	Line 127

To determine Shannon's income for Guidelines purposes, the following adjustments must be made to Total Income:

1. Deduct the net taxable capital gains of \$75,000; and
2. Add the net taxable capital gains of \$100,000.

The capital loss of \$100,000 Shannon incurred in 1998 may be deducted against the 1999 capital gains of \$200,000 even though the losses were generated in 1998.

CASE CITATION

Clark v. Clark, [July 31, 1998] Doc. Vancouver D101808 (B.C. S.C.)

Wilson v. Wilson, [1998] 8 W.W.R. 493 (Sask. Q.B.)

4.8 SECTION 7: BUSINESS INVESTMENT LOSSES

The actual business investment loss the spouse suffered in the year is deducted from his or her Total Income.

COMMENTARY

A business investment loss, a type of capital loss, is accorded special treatment under the ITA, and arises on the disposition of shares or debt of a small business corporation (as defined in the ITA). While capital losses are generally only deductible against capital gains, business investment losses are deductible against any type of income.

Business investment losses are deducted below the Total Income line on the tax return, so any business investment loss incurred by a spouse should be deducted from Total Income when calculating income for child support purposes.

The amount of the business investment loss reported on the spouse's federal tax return is 75 percent of the actual business investment loss (referred to as an allowable business investment loss—Line 217 of the federal income tax return). Therefore, it is appropriate, when determining income for child support purposes, to deduct the actual investment loss and not the allowable business investment loss.

Example

Bob has the following sources of income, as set out on his federal tax return:

		<i>Tax Return Reference</i>
Employment income	\$ 500,000	
Interest income	<u>100,000</u>	
Total Income	\$ 600,000	Line 150
Allowable business investment loss (ABIL)	<u>-75,000</u>	Line 217
Net Income	<u>\$ 525,000</u>	Line 236

Line 217 of Bob's federal tax return reports an ABIL of \$75,000. The actual business investment loss Bob incurred is \$100,000 (calculated by dividing the amount of the ABIL (\$75,000) by 0.75). Therefore, Bob's Total Income for Guidelines purpose is \$500,000 (Total Income of \$600,000 less the actual business investment loss of \$100,000), assuming the court does not consider the loss to be a non-recurring amount (see subsection 17(2) for a more detailed discussion).

CASE CITATION

Omah-Maharajh v. Howard, [1998] 58 Alta. L.R. (3d) 236, [1998] 7 W.W.R. 342, 215 A.R. 159 (Alta. Q.B.)

4.9 SECTION 8—CARRYING CHARGES

The carrying charges and interest expenses the spouse pays and that would be deductible under the ITA are deducted from his or her Total Income for Guidelines purposes.

COMMENTARY

Carrying charges include interest, investment counsel fees and other expenses incurred to generate property income. For example, a spouse may borrow money to invest in stocks. The income earned from the stocks is included as investment income in Total Income, but the interest costs incurred to generate that investment income should be deducted from Total Income when determining income for Guidelines purposes.

In Lamparski v. Lamparski, the court allowed the mother to deduct from Total Income interest expenses she incurred running her daycare business.

CASE CITATION

Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52 (B.C.S.C.)

4.10 SECTION 9: NET SELF-EMPLOYMENT INCOME—NON-ARM'S LENGTH PAYMENTS

When a spouse earns self-employment income, any payments (including salary) he or she makes to non-arm's length persons must be added to Total Income, unless the spouse can demonstrate that the payments were necessary to earn self-employment income and were reasonable.

COMMENTARY

Example

Homer is self-employed and has the following sources of income as set out on his federal tax return:

		<i>Tax Return Reference</i>
Business income (net)	\$ 200,000	
Interest and other investment income	<u>50,000</u>	
Total Income	<u>\$ 250,000</u>	<i>Line 150</i>

Homer's father works part-time as a receptionist for his son's business and earns \$65,000 per year. The other part-time receptionist earns \$20,000 per year. Homer pays his father a salary of \$45,000 above market.

Homer's income for Guidelines purposes, then, is \$295,000, which is his Total Income of \$250,000 plus \$45,000, which is the portion of the salary he pays to his father that is in excess of a market salary and is, therefore, considered not necessary or reasonable.

The Guidelines place the onus on the business owner to provide evidence to support the payments paid to non-arm's length parties. There is the potential that the remuneration paid to family members will exceed the amount that would be paid to an arm's length person, in which case the net business income and the income for child support purposes would be lower than it should otherwise be.

In Poff v. Fenell, the money the mother paid to her son for work done on the family farm was included in her income for Guidelines purposes because the court found that the mother had not produced evidence of the necessity and reasonableness of the payments. Thus, she had not discharged her burden to support payments made to a non-arm's length party.

In Omah-Maharajh v. Howard, the father paid to his new wife a salary to administer his medical practice. The court found that the amount paid to the new wife was both necessary and reasonable. Therefore, no additional income was imputed to the father.

CASE CITATION

Donald v. Donald, [1998] 80 A.C.W.S. (3d) 384 (N.B.Q.B.)

Gareau v. Gareau, [1998] 80 A.C.W.S. (3d) 362 (Man. Q.B.)

McDonald v. Gross, [1998] 79 A.C.W.S. (3d) 979 (Sask. Q.B.)

Omah-Maharajh v. Howard, [1998] 58 Alta. L.R. (3d) 236, [1998] 7 W.W.R. 342, 215 A.R. 159 (Alta. Q.B.)

Poff v. Fenell, [1998] 82 A.C.W.S. (3d) 732 (Sask. Q.B.)

4.11 SECTION 10: NET SELF-EMPLOYMENT INCOME—CHANGE IN FISCAL YEAR

When a spouse reports self-employment income for the reporting year (i.e. 12 months) and an additional amount of income earned in a prior year due to a change in the income tax rules, the amount earned in a prior year, net of reserves, must be deducted from Total Income.

COMMENTARY

Self-employed individuals or partnerships with professional businesses commencing prior to 1995 used to be allowed to have a fiscal year end that did not coincide with the calendar year, but the government has effectively eliminated these for tax purposes. Transitional income tax rules are in effect until 2004 that require self-employed individuals to calculate their income from the end of the 1995 fiscal year to December 31, 1995. The individuals are required to include this "stub period" income in their self-employment income at the minimum rate of 5 percent in 1995, 10 percent in each year from 1996 to 2003 and 15 percent in 2004. Therefore, from 1996 to 2004, income reported on the tax return may be increased to include income that was actually earned prior to 1996. As a result, total business income may not be a true reflection of income earned in the year. The purpose of section 10 is to ensure spouses deduct this stub period income so their income figure reflects only the actual business income earned in the year.

Section 10 refers to this stub period income as the amount earned in the prior period, net of reserves.

Example

If Steve earned \$100 in the stub period (from the end of fiscal 1995 to December 31, 1995), he would be allowed a reserve of \$95 in 1995, so only \$5 would be taxed. The \$95 reserve would then be taken into income over the next nine years.

Section 10 of Schedule III requires Steve to deduct the actual amount he earned in the prior year net of reserves so it will not be included when calculating income for Guidelines purposes.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on page 28 of the consultation paper.

CASE CITATION

Kelly v. Kelly, [1997] 33 R.F.L. (4th) 16, 162 Sask. R. 74, [1997] S.J. No. 604 (Q.B.)
Watson v. Bruce, [1998] 82 A.C.W.S. (3d) 325 (B.C.S.C.)

4.12 SECTION 11: CAPITAL COST ALLOWANCE FOR PROPERTY

The amount a spouse deducted for capital cost allowance for real property must be added to Total Income.

COMMENTARY

Rental income is reported net of expenses on the personal income tax return. For tax purposes, individuals can deduct capital cost allowance from net rental income because it is a non-cash expenditure that will likely be recovered when the property is sold. If capital cost allowance were not added to Total Income for Guidelines purposes, the spouse would benefit from reduced income because of an expense that is not an ongoing operating expenditure.

Only capital cost allowance taken on real property is added to income. Capital cost allowance claimed on equipment or other business or rental assets is not added because the value of these assets depreciates and they will have to be replaced from time to time.

CASE CITATION

Doerge v. Doerge, [1998] 162 Sask. R. 145, 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B.)
Pietrus v. Pietrus, [January 28 1999] Doc. Regina Q.B. 15442/93 (Sask. Q.B.)

4.13 SECTION 12: PARTNERSHIP INCOME

When the spouse earns income through a partnership, the amount that is properly required by the partnership to capitalize the partnership (i.e. leaving funds in the business) should be deducted from Total Income.

COMMENTARY

A spouse may earn income from a partnership, and include that income on his or her personal income tax return as partnership income regardless of the amount he or she actually withdrew from the partnership.

A partner may not be able to withdraw from the partnership all of the income attributable to him or her. For example, the partnership may be experiencing cash flow problems and the partners may withhold their income to cover operating costs or to finance additional capital expenditures. These funds would not be available to a spouse for child support purposes; therefore, the portion of a spouse's partnership income that has been withheld for capitalization purposes is deducted from Total Income.

4.14 SECTION 13: STOCK OPTIONS

When a spouse has *exercised* his or her employee stock options held in a Canadian-controlled private corporation (CCPC), as defined in the ITA, the following must be *added* to Total Income:

The value of the shares on the exercise date	\$xx
Less:	
1. Amount paid for shares	(xx)
2. Amount paid to acquire the option	<u>(xx)</u>
Amount <i>added</i> to Total Income	<u>\$xx</u>

When a spouse has *disposed* of the shares acquired through an employee stock option with a CCPC, the following must be *deducted* from Total Income:

The value of the shares on the exercise date	\$xx
Less:	
1. Amount paid for shares	(xx)
2. Amount paid to acquire the shares	<u>(xx)</u>
Amount <i>deducted</i> from Total Income	<u>\$xx</u>

COMMENTARY

Employee stock options of CCPCs and stock options of corporations that are not CCPCs receive different tax treatment for the option holder. The income benefit¹ of a stock option of a company that is not a CCPC is included in income for tax purposes at the time the option is exercised. The income benefit of a CCPC stock option is included in income for tax purposes when the option shares are sold. Section 13, however, ensures that the income benefit of CCPC stock options is included in income for Guidelines purposes in the year in which the option is exercised. Section 13, therefore, makes the income treatment for options from CCPC's the same as for non-CCPC's. A deduction under subsection 13(2) is permitted in the year the option shares are sold to prevent double counting.

In most cases, employees exercise options and sell the shares simultaneously so the funds realized from the share sale can finance the purchase price and cover the personal income tax. The excess of the fair market value of the shares (sale price) over the cost of the shares (option price) represents the profit to the employee, which is taxed in the year in which the shares are sold. In most cases, this occurs in the same year the option is exercised so the benefit would be included in income that year.

However, there is the less common situation in which an employee exercises a stock option of a non-CCPC but does not sell the option shares. This person would have the benefit included in his or her taxable income in that year. Therefore, for Guidelines purposes, the benefit would already be reflected in Total Income for that year. Subsection 13(1) provides for similar treatment for CCPC stock options the income from which is deferred until the optioned shares are actually disposed of.

*The Department of Justice Canada's Fall 1999 consultation paper, *Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions*, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on page 29 of the consultation paper.*

5.0 SECTIONS 17 AND 18: MODIFICATIONS BY THE COURT

As described below, a court, in its discretion, may adjust annual income under specific circumstances.

5.1 SUBSECTION 17(1): PATTERN OF INCOME

The court may determine (or adjust) income when the amount earned from a specific source of income (e.g. bonus, dividends or rental income) has increased or decreased in each of the three most recent taxation years [paragraph 17(1)(a)].

¹ The income benefit is the fair market value of the shares at the time the option is exercised net of the cost of the shares (option price) and any amount paid to acquire the options. This benefit may be reduced by 25 percent when the option price was not less than the fair market value of the shares at the time the option was granted.

COMMENTARY

Example 1

Marsha earned gross dividend income in each of the three most recent taxation years as follows:

	1997	1998	1999
Dividend income	\$100	\$200	\$300

Marsha's dividend income increased in each of the three most recent taxation years. The court may determine that Marsha's income for Guidelines purposes is the amount of dividend income earned in the most recent year (\$300).

Example 2

Marsha earned bonus income in each of the three most recent taxation years as follows:

	1997	1998	1999
Bonus income	\$300	\$200	\$100

Marsha's bonus income has decreased in each of the three most recent taxation years. The court may determine that Marsha's income for Guidelines purposes is the amount of dividend income earned in the most recent year (\$100).

While paragraph 17(1)(a) does refer to using the most recent income information when income has declined in each of the three most recent tax years, it is not mandatory that income be determined in this manner. In Wilson v. Wilson, the father was a farmer whose income had declined in each of the three previous years. The court averaged the father's income for the last three years as contemplated by paragraph 17(1)(b) because, according to the court, farming income by its very nature fluctuates from year to year. The court noted that the objective of the Guidelines is to determine the fairest indicator of an individual's income.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on pages 22 and 23 of the consultation paper.

CASE CITATION

Dennett v. Dennett, [1998] 79 A.C.W.S. (3d) 332 (Alta. Q.B.)

Wilson v. Wilson, [1998] 8 W.W.R. 493 (Sask. Q.B.)

The court may determine (or adjust) income when the amount earned from a source of income (e.g. bonus, dividends or rental income) has not strictly increased or decreased during the three most recent taxation years [paragraph 17 (1)(b)].

COMMENTARY

Example 1

Marsha earned rental income in each of the three most recent taxation years as follows:

	1997	1998	1999
Rental income	\$100	\$300	\$150

Marsha's rental income has not consistently increased or decreased during the three most recent taxation years. The court may determine Marsha's income for Guidelines purposes to be \$180 (her average rental income earned over the three years).

The court may choose to determine Marsha's income for Guidelines purposes by another method; the objective is to determine Marsha's future annual income.

Example 2

Bobby earned rental income in each of the three most recent taxation years as follows:

	1997	1998	1999
Rental income	\$400	\$200	\$250

As in Marsha's situation, Bobby's rental income has not consistently increased or decreased over the three most recent taxation years. The court may determine Bobby's income for Guideline purposes to be \$280 by averaging Bobby's rental income for the three years or the court may determine Bobby's income for Guidelines purposes some other way based on other information.

When the amount earned from a source of income has not strictly increased or decreased, the court may consider the spouse's income from that source to be the average of the income from that source over the three most recent taxation years; however, the court is not obligated to do so. It has discretion to select an amount of income that, in its view, would result in the fairest determination of the annual income from that source.

In Greenwood v. Greenwood, the husband's income fluctuated over the previous three years so the court used the average.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on pages 22 and 23 of the consultation paper.

CASE CITATION

Greenwood v. Greenwood, [1998] 37 R.F.L. (4th) 422 (B.C.S.C.)

Meyers v. Meyers, [1998] 79 A.C.W.S. (3d) 329 (Sask. Q.B.)

Shepherd v. Shepherd, [1998] 82 A.C.W.S. (3d) 514 (B.C.S.C.)

The court may determine (or adjust) income when a spouse has received a non-recurring amount (eg. a severance package or a hiring bonus) in any of the three most recent taxation years [paragraph 17(1)(c)].

COMMENTARY

Example

Marsha received a hiring bonus in 1998 when she changed employers:

	1997	1998	1999
Hiring bonus	\$0	\$300	\$0

Marsha's hiring bonus is a non-recurring amount, so her income for Guidelines purposes will be in the range of \$0 to \$300. The court may determine Marsha's income for Guidelines purposes to be any portion of the \$300; the objective is to determine Marsha's future annual income.

In these circumstances, the court may include none or a portion of the non-recurring amount when determining a spouse's annual income.

In Pederson v. Walker, the payer received a lump-sum severance package. The court held that a portion of the lump-sum payment received should be imputed into the income stream each year until the children were no longer dependent.

In a number of cases, the courts have not included in a spouse's annual income for Guidelines purposes any income resulting from a non-recurring RRSP withdrawal or amounts from collapsing an RRSP (Holtby v. Holtby and Hart v. Hart). The courts have also not included non-recurring gains in a spouse's annual income for Guidelines purposes (Andersen v. Andersen).

The court has the discretion to select an amount for a particular source of income that, in its view, would result in a fairer total amount than if it simply accepted the most recent income information available on the sources of income that comprise the Total Income. The court may also adjust income when the amount disclosed on a tax return does not reflect a true projection of future income. The court reviews the spouse's annual income over a three-year period to identify trends, fluctuations and non-recurring items and to adjust for these. Such adjustments are not applied strictly by a formula; instead they serve as a framework for adjusting income when the court finds it appropriate.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on pages 22 and 23 of the consultation paper.

CASE CITATION

Andersen v. Andersen, [1997] 32 R.F.L. (4th) 177 (B.C.S.C.)
Hart v. Hart, [November 10, 1997] Doc. Regina Q.B. 016637 (Sask. Q.B.)
Holtby v. Holtby, [November 10, 1997] Doc. Regina Q.B. 016637 (Sask. Q.B.)
Pederson v. Walker, [1998] 79 A.C.W.S. (3d) 1217 (Sask. Q.B.)
Vallis v. Vallis, [1998] 82 A.C.W.S. (3d) 747 (N.S.S.C.)

5.2 SUBSECTION 17(2): NON-RECURRING CAPITAL OR BUSINESS INVESTMENT LOSSES

When a spouse suffers a non-recurring capital or business investment loss, the court may adjust the amount to what it considers to be appropriate.

COMMENTARY

Example

Marsha suffered a non-recurring capital loss in 1998 when she sold some securities:

	1997	1998	1999
Capital gains	\$500	\$500	\$500
Capital loss	\$0	(\$300)	\$0
Net taxable gains	<u>\$500</u>	<u>\$200</u>	<u>\$500</u>

Marsha's capital loss is non-recurring, so in determining Marsha's income for Guidelines purposes, the court may include any or all of the \$300 capital loss; the objective is to determine Marsha's future annual income.

Under the ITA, there are limitations and restrictions that affect the deduction of capital and business investment losses. Sections 6 and 7 of Schedule III of the Guidelines change the treatment of these losses so that the full netted capital gain or the full business investment loss (not just the taxable portion permitted by the ITA) is included in annual income for Guidelines purposes.

In determining a spouse's annual income, the court has discretion to adjust the amount of a capital or business investment loss without having to apply the amounts determined by sections 6 and 7 of Schedule III, therefore neutralizing the effect of a one-time loss. This is consistent with the court's objective to provide the fairest determination of annual income. The court may adjust the amount of the loss and any related expenses, including carrying charges and interest expenses, it considers appropriate.

In Merritt v. Merritt, the court denied the father a deduction for a one-time loss on his rental property when calculating his income for Guidelines purposes. The court held that the loss did not represent money the father was currently losing or that he would lose in the future as a result of the investment.

In Omah-Maharajh v. Howard, the court did not allow a deduction from the father's income for his allowable business investment loss of \$75,000 because the court was of the opinion that if such a deduction were permitted, the father's ability to pay child support would be understated. However, the court allowed a deduction equivalent to the annual loan repayment on money he borrowed to make the investment because the court was of the view that this would properly reflect the father's income.

CASE CITATION

McKay v. McKay, [1997] 35 R.F.L. (4th) 69 (Sask. Q.B.)

Omah-Maharajh v. Howard, [1998] 58 Alta. L.R. (3d) 236, [1998] 7 W.W.R. 342, 215 A.R. 159 (Alta. Q.B.)

Rogers v. Rogers, [1998] 83 A.C.W.S. (3d) 85 Ont. Ct. (Gen. Div.)

Merritt v. Merritt, [May 11, 1999] Doc. London F689/97 (Ont. Sup. C.J.)

5.3 SECTION 18: INCOME EARNED BY A SPOUSE IN HIS OR HER CAPACITY AS A SHAREHOLDER, DIRECTOR OR OFFICER OF A CORPORATION

When the spouse is a shareholder, director or officer of a corporation, the court may determine that the person's annual income includes the following:

1. All or part of the pre-tax income of the corporation and related corporations for the most recent taxation year; or
2. An amount representative of the services that the person provides to the corporation (i.e. remuneration) that cannot exceed the corporation's pre-tax income.

The pre-tax income of the corporation outlined above must be adjusted for any payments that the court considers unreasonable to non-arm's length persons, such as salaries, wages or management fees.

COMMENTARY

Example

Greg is the sole shareholder of a consulting business, and he is the only consultant. The financial results of the company in the 1999 taxation year are as follows:

Consulting revenue	\$1,000,000
Expenses	
Salary to Greg	\$300,000
Salary to Greg's mother	\$ 50,000
Personal expenses	\$100,000
Actual business expenses	<u>\$350,000</u>
Pre-tax business income	<u>\$200,000</u>

The only income appearing on Greg's personal tax return is the employment income he received from the company (\$300,000). If the court is of the opinion that the amount of employment income reported by Greg on his tax return does not fairly reflect all the money available to him for the payment of child support, the court may include in his income for Guidelines purposes all or part of the adjusted pre-tax income of the corporation.

The adjusted pre-tax business income of the corporation for 1999 may be calculated as follows:

Pre-tax business income	\$200,000
Adjustments	
Salary to Greg's mother	\$ 50,000 ¹
Personal expenses	<u>\$100,000 ²</u>
Adjusted pre-tax business income	<u>\$350,000</u>

1. The salary Greg paid to his mother (a non-arm's length person), who does not provide services to the business, was added because the court likely would not consider this a reasonable business expense [subsection 18(2)].
2. Personal expenses were added because the court would likely not consider these expenses as having been incurred for the operations of the business [subsection 18(2)].

The court may determine Greg's income for Guidelines purposes to include any portion of the \$350,000 adjusted pre-tax business income. That adjusted income of \$350,000 and Greg's employment income of \$300,000 most likely reflect what Greg would have earned if he had not incorporated the business.

When the spouse is a shareholder, director or officer of a corporation, the court has the discretion to select an amount of pre-tax business income that, in its view, gives a fairer amount of annual income than if it simply accepted the Total Income as shown on the spouse's most recent income tax return adjusted in accordance with Schedule III. The objective of the court is to determine the annual income available to a spouse to pay child support.

The amount of corporate income, if any, to be attributed to a shareholder is at the court's discretion. Recent cases have illustrated a general reluctance by courts to attribute corporate income to a shareholder. When assessing whether to do so, the court may consider the following factors:

- *The nature of the corporation's business (i.e. a consulting business, which is not capital-intensive, is less likely to require its profits to be reinvested and more likely to be in a position to distribute those profits to its shareholders);*
- *The internal structure and ownership of the corporation (i.e. when other arm's length shareholders are involved, the court will be hesitant to interfere with the management of the corporation);*
- *The financial status of the corporation (i.e. a business that is financially weak is more likely to need to reinvest its profits to fund working capital requirements and future growth); and*
- *The historical practice of the corporation (i.e. has the corporation historically reinvested its excess income rather than distribute it to its shareholders?).*

In Beeching v. Beeching, the court considered the profits of the corporation to belong to the corporation until such time as they are declared as dividends because directors have the power to declare dividends. As the court pointed out, that power is fiduciary in nature and must be exercised in good faith and in the best interest of the company. Moreover, the court was of the opinion that when other arm's length shareholders are involved, the court should hesitate before interfering with the management of the corporation.

In Stamoulos v. Pavlakis, the court held that the adjustments contemplated by section 18 should be made sparingly. According to the court, the provisions of section 18 should be used only when there is evidence that a spouse is structuring his or her compensation in order to reduce support obligations under the Guidelines, or when the company is subsidizing an individual's personal and living expenses through corporate disbursements. Similarly, in Kelly v. Kelly, the court held that subsection 18(1) would not require that all of the net income be paid out as dividends and that the retained earnings be severely restricted in every instance involving a corporation. The court in this case declined to attribute the balance of the corporate income to the spouse because most of the corporate profits were paid out as dividends.

When the spouse is the sole shareholder of a company, courts have been less reluctant to look through the corporate structure and attribute the pre-tax income of the corporation to the spouse.

In Desjardins v. Desjardins, the court imputed half the pre-tax income of the corporation to the father who was the sole shareholder of a consulting company. He was also the only consultant and drew substantial employment income from the corporation. The court was of the view that the adjusted income better reflected what Mr. Desjardins would have earned if he had not incorporated the business.

In Blackburn v. Elmitt, the father, a dentist, carried on his practice through a professional corporation that employed him. The court held that the net revenues of the company plus a salary paid to him represented the true value of his services to the company.

CASE CITATION

Blackburn v. Elmitt, [1997] 34 R.F.L. (4th) 183, [1997] B.C.J. No. 2569 (S.C.)
Graham v. Graham, [1997] B.C.J. No. 1973 (S.C.)
Kelly v. Kelly, [1997] 33 R.F.L. (4th) 16, 162 Sask. R. 74, [1997] S.J. No. 604 (Sask. Q.B.)
Petrick v. Petrick, [1997] B.C.J. No. 2974 (S.C.)
Rudachyk v. Rudachyk, [1997] S.J. No. 314 (Q.B.)
Shelleby v. Shelleby, [1997] O.J. No. 2608 (Gen. Div.)
Stamoulos v. Pavlakis, [1997] 32 R.F.L. (4th) 75, 41 B.C.L.R. (3d) 14 (B.C. S.C.)
Arsenault v. Arsenault, [1998] O.J. No. 1423 (Gen. Div.)
Beeching v. Beeching, [1998] S.J. No. 355 (Q.B.)
Desjardins v. Desjardins, [1998] B.C.J. No. 1173 (S.C.)
Holst v. Holst, [1998] B.C.J. No. 1107 (S.C.)
Jess v. Strong (unreported, June 26, 1998, N.S.S.C.)
Kramer v. Kramer, [1998] 81 A.C.W.S. (3d) 287 (Sask. Q.B.)
Needham v. Needham, [1998] B.C.J. No. 202 (S.C.)
Raczynski v. Raczynski, [1998] 83 A.C.W.S. (3d) 83 (Sask. Q.B.)
Schaber v. Schaber, [1998] 79 A.C.W.S. (3d) (Sask. Q.B.)
Schroder v. Schroder, [1998] A.J. No. 518 (Q.B.)
Watkin v. Hall, [1998] M.J. No. 310 (Q.B.)

6.0 SECTION 19: IMPUTING INCOME

The court, in its discretion, may impute income to a spouse under certain circumstances, which are outlined below. The court may decide there are other circumstances for imputing income than those outlined in the Guidelines (*Halley v. Hannon* and *Risen v. Risen*).

CASE CITATION

Halley v. Hannon, [1998] 162 Nfld. & P.E.I. R. 315 (Nfld. U.F.Ct.)
Risen v. Risen, [1998] 81 A.C.W.S. (3d) 669 (Ont. Ct. (Gen. Div.))

6.1 PARAGRAPH 19(1)(A): SPOUSE IS INTENTIONALLY UNEMPLOYED OR UNDEREMPLOYED

The court may impute income to a spouse if he or she is intentionally underemployed or unemployed, except when the needs of a child of the marriage or any child under the age of majority or the reasonable educational or health needs of the spouse require it.

COMMENTARY

Example

Peter worked as a plumber but quit his job to play in a band. The court may consider Peter to be intentionally underemployed and impute income to him based on the income in his most recent year as an employed plumber.

A court may impute income to an underemployed or unemployed spouse as it considers appropriate. In making this determination, the court could consider what is reasonable in the circumstances including the age, experience, skill and health of the spouse. As well, the court could consider the availability of work, the spouse's freedom to relocate and other obligations.

In Williams v. Williams, the court held that, for the court to impute income, the word intentionally in section 19 means that there must be a deliberate intent to avoid support obligations. The court in Petrick v. Petrick disagreed and imputed income to the father even though, prior to the separation date, he had legitimately left the family business to embark on a career as a country singer.

CASE CITATION

Clements v. Clements, [1997] Y.J. No. 72 (S.C.)
Cornborough v. Cornborough, [1997] B.C.J. No. 1981 (S.C.)
Forzley v. Forzley, [1997] B.C.J. No. 2881 (S.C.)
Giroux v. Giroux, [1997] S.J. No. 729, (Q.B.)
Gran v. Gran, [1997] S.J. No. 330 (Q.B.)
Khoe-Solomonescu v. Solomonescu, [1997] O.J. No. 4876 (Gen. Div.)
McLean v. McLean, [1997] O.J. No. 5315, (Gen. Div.)
Miller v. McClement, [1997] S.J. No. 761 (Q.B.)
Nagy v. Tittlemore, [1997] S.J. No. 810 (U.F.C.)
Petrick v. Petrick, [1997] B.C.J. No. 2974 (S.C.)
Quintal v. Quintal, [1997] O.J. No. 3444 (Gen. Div.)
Rains v. Rains, [1997] O.J. No. 2516 (Gen. Div.)
Savage v. Savage, [1997] A.J. No. 1244 (Q.B.)
Seitz v. Seitz, [1997] S.J. No. 730 (Q.B.)
Weber v. Weber, [1997] B.C.J. No. 2842 (S.C.)
Williams v. Williams, [1997] N.W.T.J. No. 49 (S.C.)
Brown-Fraser v. Stevenson, [1998] 80 A.C.W.S. (3d) 1050 (Sask. Q.B.)
Carson v. Buzia, (February 18, 1998) Doc. Battleford Q.B.G. 234/96 (Sask. Q.B.)
Chace v. Chace, [1998] 81 A.C.W.S. (3d) 667 P.E.I.S.C.
Chan v. Spencer, [1998] B.C.J. No. 1317 (S.C.)
Collins v. Collins, [1998] A.J. No. 417 (Q.B.)
Courchesne v. Charlebois, [1998] O.J. No. 2656 (Prov. Div.)
Ewaniw v. Ewaniw, [1998] A.J. No. 704 (Q.B.)
Gibney v. Gibney, [1998] B.C.J. No. 632 (S.C.)
Graham v. Graham, [1998] B.C.J. No. 185 (S.C.)
Hinkson v. Hinkson, (unreported, June 19, 1998, Sask. Q.B.)
Hrycak v. Hrycak, [1998] A.J. No. 156 (Q.B.)
Hunt v. Smolis-Hunt, [1998] A.J. NO. 514 (Q.B.)
Kraft v. Kraft, [1998] 80 A.C.W.S. (3d) 820 (Alta. Q.B.)
Lord v. Lord, [1998] B.C.J. No. 191 (S.C.)

Melzack v. Germain, [1998] O.J. No. 2341 (C.A.)
Omah-Maharajh v. Howard, [1998] A.J. No. 173 (Q.B.)
Pederson v. Walker, [1998] S.J. No. 350 (Q.B.)
Rusch v. Rusch, [1998] N.W.T.J. No. 14 (S.C.)
S.A.J.M. v. D.D.M., [1998] M.J. No. 173 (Q.B.)
Tougher v. Tougher, [1998] A.J. No. 294 (Q.B.)
Wilgosh v. Wilgosh, [1998] S.J. No. 292 (Q.B.)
Yaremchuk v. Yaremchuk, [1998] A.J. No. 258 (Q.B.)

6.2 PARAGRAPH 19(1)(B): SPOUSE IS TAX EXEMPT

The court may impute income when the spouse is exempt from paying federal or provincial income tax.

COMMENTARY

Example

Cindy is a status Indian living on a reserve and is exempt from federal and provincial income tax. The court may impute income to her in the amount of the tax savings for the purposes of determining child support under the Guidelines.

In Ninham v. Ninham, the court imputed income to both parents because they were exempt from federal and provincial income taxes due to their Indian status. In Hoover v. Hoover, the court imputed income because the father did not have to pay income tax on his Workers' Compensation Board pension benefit

CASE CITATION

Hoover v. Hoover, [1997] N.W.T.J. No. 43, [1998] N.W.T.R. 209 (N.W.T. S.C.)
Ninham v. Ninham, [1997] 32 R.F.L. (4th) 23, [1997] N.W.T.J. No. 49, [1997] N.W.T.R. 303 (N.W.T.S.C.)
Ewaniw v. Ewaniw, (unreported, June 22, 1998, Alta. Q.B.)
Harmatiuk v. Harmatiuk, (unreported, October 16, 1998 Ont. Ct. (Gen. Div.)
Le Bourdais v. Le Bourdais, [1998] B.C.J. No. 217 (S.C.)
Norrad v. Norrad, [1998] 80 A.C.W.S. (3d) 350 (N.B.Q.B.)
Paul v. Paul, [1998] N.B.J. No. 88 (Q.B.)
Schaber v. Schaber, [1998] S.J. No. 308 (Q.B.)

6.3 PARAGRAPH 19(1)(C): NON-RESIDENT SPOUSE SUBJECT TO LOWER TAX RATES

The court may impute income to a spouse if he or she is subject to tax in a foreign jurisdiction and benefits from having a lower effective income tax rate than he or she would have in Canada.

CASE CITATION

R. (E.K.) v. W. (G.A.), [1997] 32 R.F.L. (4th) 202 (Man. Q.B.)
Garrison v. Garrison, [1998] 38 R.F.L. (4th) 435 (Ont. Ct. Gen. Div.)
Nkwazi v. Nkwazi, [July 20, 1998] Doc. Saskatoon U.F.C. 1020/93 (Sask. Q.B.)

6.4 PARAGRAPH 19(1)(D): SPOUSE HAS DIVERTED INCOME

The Court may impute income when it appears that the spouse has diverted income that would affect the level of child support determined under the Guidelines.

COMMENTARY

Example

Mike was paid \$7,000 a year in cash for coaching a hockey team. He kept that money in a separate bank account and did not report it on his income tax return. The court may impute an additional amount of income to Mike.

In Millar v. Millar, the court imputed income to the father because he deducted certain expenses from his business that he could not explain. The court concluded that these expenses reduced the earnings of the company and thus diverted income that would otherwise be used to determine the level of child support.

CASE CITATION

Lamparski v. Lamparski, [1997] 35 R.F.L. (4th) 52 (B.C. S.C.)

Collins v. Collins, [1998] A.J. No. 417 (Q.B.)

Forbes v. Forbes, [1998] B.C.J. No. 1180 (S.C.)

Laflamme v. Laflamme, [1998] A.J. No. 292 (Q.B.)

Millar v. Millar, [October 2, 1998] Doc. New Westminster D42071 (B.C. Master)

Sferra v. Sferra, [1998] B.C.J. No. 1078 (S.C.)

Weibe v. Oviatt, [1998] S.J. No. 303 (Q.B.)

6.5 PARAGRAPH 19(1)(E): SPOUSE DOES NOT REASONABLY UTILIZE PROPERTY TO GENERATE INCOME

The court may impute income when, in its view, the spouse is not reasonably using his or her property to generate income.

Example

Bobby owns a property that he is not currently renting out. Whitney works two jobs and pays all the children's expenses. The court may impute income to Bobby based on the amount of rental income he could generate on his rental property.

CASE CITATION

Pentland v. Kopp, [1998] O.J. No. 2678 (Gen. Div.)

6.6 PARAGRAPH 19(1)(F): SPOUSE FAILED TO PROVIDE INCOME INFORMATION

The court may impute income when the spouse has failed to provide income information when legally obliged to do so.

COMMENTARY

Example

Peter fails to make financial disclosure to the court though he has been ordered to do so on several occasions. The court may impute income to Peter based on evidence presented to it, such as Peter's past work history and lifestyle.

This section applies when a spouse fails to:

- 1. Comply with the disclosure requirements of the Guidelines; and*
- 2. Declare income for income tax purposes.*

In both Engebretson v. Pellettieri and Garrison v. Garrison, the father failed to make financial disclosure to the court though he had been ordered to do so on several occasions. In both cases, the courts imputed income to the father based on the mother's evidence of the father's past work history and lifestyle.

CASE CITATION

Vivier v. Vivier, [1997] M.J. No. 414 (Q.B.)

Assinck v. Assinck, [1998] O.J. No. 875 (Gen. Div.)

Cowger v. Cowger, [1998] N.W.T.J. (S.C.)

Engebretson v. Pellettieri, [1998] S.J. No. 411 (Q.B.)

Garrison v. Garrison, [1998] 38 R.F.L. (4th) 435 (Ont. Ct. Gen. Div.)

6.7 PARAGRAPH 19(1)(G) AND SUBSECTION 19(2): SPOUSE UNREASONABLY DEDUCTS EXPENSES FROM INCOME

The court may impute income when the spouse unreasonably deducts expenses from income [paragraph 19(1)(g)]. The reasonableness of a deduction is not solely governed by whether the deduction is permitted by the ITA [subsection 19(2)].

COMMENTARY

Example

Jan is self-employed and deducts from her income such expenses as entertainment, vacations and depreciation on personal property. The court may impute income to Jan on the grounds that she unreasonably deducted personal expenses from income.

The issue for Guidelines purposes is whether deductions permitted by the ITA still allow a fair determination of the actual income available to the spouse for child support.

Any personal expenses are added back to income. The onus is on the self-employed individual to support the reasonableness of the deductions from his or her income.

In Martin v. Martin, the court added back into the father's income the personal expense portion of his car insurance that he had deducted from the gross income of his business.

In Hill v. Hill, the father operated an appraisal business with a partner. The father's 50 percent share of the profits were paid to a management company from which the father received an annual salary. The father also claimed deductions from the income of the management company for personal expenses. The court attributed to the father's income the profits from the appraisal business that were not paid out as salary and the expenses that the father had deducted for income tax purposes that the court determined were actually for his own use.

CASE CITATION

Cornborough v. Cornborough, [1997] B.C.J. No. 1981 (S.C.)
Lowry v. Lowry, [1997] A.J. No. 967 (Q.B.)
McKerracher v. McKerracher, [1997] B.C.J. No. 2257 (S.C.)
Nagy v. Tittemore, [1997] S.J. No. 810 (U.F.C.)
Weber v. Weber, [1997] B.C.J. No. 2842 (S.C.)
Adams v. Loov, [1998] 80 A.C.W.S. (3d) 378 (Alta. Q.B.)
Clark v. Kubek, [1998] A.J. No. 68 (Q.B.)
Cornelius v. Andres, [1998] M.J. No. 86 (Q.B.)
Crawford v. Crawford, [1998] S.J. No. 322 (Q.B.)
Davids v. Davids, [1998] 80 A.C.W.S. (3d) 1205 Ont. Ct. (Gen Div.)
Desjardins v. Desjardins, [1998] B.C.J. No. 1173 (S.C.)
Gareau v. Gareau, [1998] 80 A.C.W.S. (3d) 362 (Man. Q.B.)
Holst v. Holst, [1998] 79 A.C.W.S. (3d) 582 (B.C.S.C.)
Lamb v. Lamb, [1998] 79 A.C.W.S. (3d) 561 (Sask. Q.B.)
Martin v. Martin, [June 22, 1998] Doc. Saskatoon DIV. 379/96 (Sask. Q.B.)
McDonald v. Gross, [1998] 79 A.C.W.S. (3d) 979 (Sask. Q.B.)
O'Hara v. O'Hara, [1997] 33 R.F.L. (4th) 37 (Sask. Q.B.)
Omah-Maharajh v. Howard, [1998] A.J. No. 173 (Q.B.)
Osiowy v. Osiowy, [1998] 82 A.C.W.S. (3d) 739 (Sask. Q.B.)
Paynter v. Sackville, [1998] S.J. No. 56 (Q.B.)
Poff v. Fenell, [1998] 82 A.C.W.S. (3d) (Sask. Q.B.)
Ruecker v. Ruecker, [1998] S.J. No. 408 (Q.B.)
Seiferling v. Langmaier, [1998] S.J. No. 84 (Q.B.)
Simpson v. Palma, [1998] 82 A.C.W.S. (3d) 129 (Sask. Q.B.)

Stamp v. McIntosh, [1998] A.J. No. 429 (Q.B.)

Stokes v. Stokes, [1998] S.J. No. 321 (Q.B.)

Wilson v. Wilson, [1998] S.J. No. 236 (Q.B.)

Hill v. Hill, [February 4, 1999] Doc. Saskatoon U.F.C. 283/92 (Sask. Q.B.)

6.8 PARAGRAPH 19(1)(H): SPOUSE EARNS INCOME FROM SOURCES TAXED AT LOWER RATES

The court may impute income when a spouse earns a significant portion of his or her income from dividends, capital gains or other sources that are taxed at a lower tax rate than employment or business income.

COMMENTARY

The Total Income reported on a spouse's federal income tax return is a pre-tax amount. The effective tax rate varies depending on the type of income a spouse receives. For example, dividends and capital gains are taxed at a lower tax than employment or business income. Therefore, a spouse would have more after-tax income (cash) available if a significant portion of his or her Total Income is derived from dividends and/or capital gains rather than from a salary of the same amount. The court may impute income to a spouse who earns a significant portion of Total Income from dividend and/or capital gains because of the benefit of the lower tax rate on these sources of income.

Example

Marcelo earns capital gains of \$100,000. Capital gains are taxed at a lower tax rate (assume 38 percent) than employment income (assume 50 percent). Therefore, because his income is derived from capital gains, Marcelo has more after tax income (cash) available than if he earned a salary of the same amount, as illustrated in the chart below:

Capital gain	\$100,000	-
Employment income	-	\$100,000
Tax at 38%	(38,000)	-
Tax at 50%	<u>-</u>	<u>(50,000)</u>
After-tax income	<u>\$62,000</u>	<u>\$50,000</u>

The court may impute income to Marcelo of up to \$12,000, the difference between the two after-tax incomes, to account for the benefit of the lower tax rate on the capital gains.

The Department of Justice Canada's Fall 1999 consultation paper, Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions, discusses this issue. The relevant pages of this consultation paper are included as an annex to this article. Please see relevant excerpts on page 24 of the consultation paper.

CASE CITATION

Droit de la famille, 2840, [1997] R.D.F.865 (Que. S.C.)

6.9 PARAGRAPH 19(1)(I): SPOUSE IS A TRUST BENEFICIARY

The court may impute income when a spouse is the beneficiary of a trust and is receiving or will receive income or other benefits from it.

COMMENTARY

A spouse may receive a significant amount of income as a beneficiary of a trust. Generally, income earned from a trust is included in Total Income in a spouse's personal income tax return; however, if a spouse is the beneficiary of a discretionary trust then he or she may manipulate the level of income available. In this case, the Court may impute income to a spouse.

CASE CITATION

Jackson v. Jackson, [1997] 35 R.F.L. (4th) 194, [1997] O.J. No. 4790 (Gen. Div.)

7.0 SECTION 20: NON-RESIDENT SPOUSE

When a spouse is a non-resident of Canada, his or her annual income is determined as though he or she were a resident of Canada.

COMMENTARY

Example

Isabella is a resident of Italy and earns her income in lira. Her income must be converted to Canadian dollars for Guidelines purposes.

In Mascarenhas v. Mascarenhas, the father, a non-resident of Canada, requested that he be treated as if he were a Canadian pursuant to section 20 and that the court treat his capital gains as though they had been sheltered in an RRSP (RRSP tax shelters are only available to Canadian residents). The court held that the father's capital gains had to be included in his income for Guidelines purposes since they were an annual recurring amount.

If the non-resident spouse lives in a country that has significantly lower effective income tax rates than those in Canada, the court may impute income to the non-resident spouse at its discretion [paragraph 19(1)(c)].

CASE CITATION

R. (E.K.) v. W. (G.A.), [1997] 32 R.F.L. (4th) 202 (Man. Q.B.)

Fibiger v. Fibiger, [1998] 38 R.F.L. (4th) 258 (B.C.S.C.)

Garrison v. Garrison, [1998] 38 R.F.L. (4th) 435 Ont. Ct. (Gen. Div.)

Marshall v. McNeil, [1998] 36 R.F.L. (4th) 264 (Sask. Q.B.)

Mascarenhas v. Mascarenhas, [1999] O.J. No. 37. (Gen. Div.)

ANNEX

PROPOSED SOLUTION

Remove the reference to *proportion* in paragraph 13(e).

Also remove the reference to the particulars of the expense. This change could mean that parents would not have to return to court to vary an order when the activity for which the special expense was granted changes.

CHANGE

(e) the particulars of any expense described in subsection 7(1), the child to whom the expense relates, and the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense; and

TO

(e) where an expense is determined under any of paragraphs 7(1)(a) to (f), the amount determined in respect of each applicable paragraph and the name of the child to whom the expense relates; and

**Sections 16 and 17 and subsection 2(3):
Pattern of income****CURRENT
PROVISIONS**

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source

- (a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;
- (b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or
- (c) where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.

2. (3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

ISSUE

Subsection 17(1) was intended to address situations when a parent's income fluctuates and using section 16 would not be the fairest way to evaluate income. Problems arise when looking at the alternative approaches listed in subsection 17(1).

Paragraph 17(1)(a) is very similar to section 16 and, in fact, section 17 is being used in cases when section 16 should apply.

In addition, section 17 may not make it clear that, when current and future income does not, and will not, bear any fair relationship to past income, the court is not bound to base its income calculations on income information from previous years. Paragraphs (a), (b) and (c) were intended only to be guides to enable a fair prediction of current income. Subsection 2(3) provides the overriding principle in the Guidelines about income information.

PROPOSED SOLUTION

Rewrite section 17 to distinguish it from section 16. Section 17 applies when past income information may be helpful in determining the income level for child support purposes, and when the income amount determined under section 16, using the most recent information on sources of income, is not appropriate.

CHANGE

17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source
- (a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;
 - (b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or
 - (c) where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.

TO

17. Where the court is of the opinion that the amount of income from a source of income under section 16 will not provide the fairest determination of the amount of income from that source, the court may take into account the spouse's income from that source over the last three taxation years and determine an amount that is fair and reasonable in light of any pattern of income or the receipt of a non-recurring amount in respect of that source of income.

Section 19: Imputing income

CURRENT PROVISION

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - (b) the spouse is exempt from paying federal or provincial income tax;
 - (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
 - (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

ISSUE

Although subsection 19(1) provides a non-exhaustive list of circumstances in which the courts can impute, or attribute, income to a parent, there have been suggestions that the list should include sources of income that are not taxed.

Doing so would eliminate confusion about paragraph (b), which refers only to people (as opposed to sources of income) who are tax-exempt, as well as about paragraph (h), which refers only to sources of income being taxed at a lower rate (as opposed to not being taxed at all).

PROPOSED SOLUTION

Add a reference to sources of income that are exempt from tax in paragraph 19(h).

CHANGE

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income; and

TO

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or **that are exempt from tax**; and

Section 21: Income information

CURRENT PROVISION

21. (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment or re-assessment issued to the spouse for each of the three most recent taxation years;
- (c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
- (d) where the spouse is self-employed, for the three most recent taxation years
 - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
 - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;
- (e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;
- (f) where the spouse controls a corporation, for its three most recent taxation years
 - (i) the financial statements of the corporation and its subsidiaries, and
 - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length; and
- (g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements.

ISSUE 1: Disclosure

There has been a suggestion that other documents not currently included in the list in section 21 may also be required to determine the parent's income, especially when income should be imputed.

PROPOSED SOLUTION

Add a paragraph requesting income information statements that are not currently included in the list of required documents.

Add

(h) where the spouse receives income from a source other than (c) to (g), the most recent statement of income indicating the total amount paid in the year to date, including the amount of the spouse's employment insurance, social assistance, pension, workers' compensation, disability payments, or such other benefits or income as may apply, or where such a statement is not provided, a letter from the applicable source of income stating the required information.

ISSUE 2: Sworn statements

Although the Guidelines allow the courts to impute income to either parent under section 19 (see page 25), judges require financial information before deciding whether to impute income. Some parties have noted that the evidence required to make a section 19 argument is difficult to obtain.

PROPOSED SOLUTION

Add a paragraph to section 21 requiring the parent to file a list of his or her assets and liabilities.

Add

(i) if not already provided in the rules of practice of the competent jurisdiction, a sworn statement of the personal net worth of the spouse showing the value of all of the spouse's assets and liabilities.

Schedule III, section 1: Employment expenses

CURRENT PROVISION

1. Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the *Income Tax Act* are deducted:

- (a) paragraph 8(1)(c) concerning expenses of clergyman's residence;
- (b) paragraph 8(1)(d) concerning expenses of teacher's exchange fund contribution;
- (c) paragraph 8(1)(e) concerning expenses of railway employees;
- (d) paragraph 8(1)(f) concerning sales expenses;
- (e) paragraph 8(1)(g) concerning transport employee's expenses;
- (f) paragraph 8(1)(h) concerning travel expenses;
- (g) paragraph 8(1)(i) concerning dues and other expenses of performing duties;
- (h) paragraph 8(1)(j) concerning motor vehicle and aircraft costs;
- (i) paragraph 8(1)(l.1) concerning *Canada Pension Plan* contributions and *Employment Insurance Act* premiums paid in respect of another employee who acts as an assistant or substitute for the spouse;
- (j) paragraph 8(1)(n) concerning salary reimbursement;
- (k) paragraph 8(1)(o) concerning forfeited amounts;
- (l) paragraph 8(1)(p) concerning musical instrument costs; and
- (m) paragraph 8(1)(q) concerning artists' employment expenses.

ISSUE 1: Expenses of clergyman's residence

The deduction in paragraph (a) differs from the other deductions in section 1 because it allows a member of the clergy to deduct his or her personal residence expenses. The other deductions in section 1 refer to actual expenses paid by an employee to perform the duties of employment. These other expenses would not be incurred but for employment; however, everyone incurs expenses for their residence. The deduction for a member of the clergy's residence provides an individual with a benefit under tax law that may not be fair to apply when determining income for the purposes of child support.

PROPOSED SOLUTION

Remove paragraph (a) in Schedule III, section 1.

ISSUE 2: Motor vehicle travel expenses

Motor vehicle travel expenses are an allowable deduction under paragraph 8(1)(h.1) of the *Income Tax Act*. Section 1 does not list motor vehicle travel expenses (such as mileage and maintenance) as a deduction, although they are similar to the other employment expenses. They are also not included under paragraph (h), which refers to the cost of buying a vehicle. Judges regularly grant motor vehicle travel expenses, assuming they are covered somewhere in section 1.

PROPOSED SOLUTION

Add a paragraph such as the following to the current list to specifically cover motor vehicle travel expenses.

Add

(f.1) paragraph 8(1)(h.1) concerning motor vehicle travel expenses incurred by a spouse who is ordinarily required to work away from the employer's place of business or required under contract to pay motor vehicle expenses incurred in the performance of the work and did not receive a motor vehicle allowance that was not included in income or claim a deduction under another paragraph;

Schedule III, section 4: Social assistance

CURRENT PROVISION

4. Adjust social assistance income to include the amount determined to be attributable to the spouse.

ISSUE

The wording of this section requires clarification to be consistent with the wording found in the other sections in Schedule III, which generally refer to replacing or deducting amounts.

PROPOSED SOLUTION

Replace the word *adjust* with *deduct*.

CHANGE

4. Adjust social assistance income to include the amount determined to be attributable to the spouse.

TO

4. **Deduct** any amount of social assistance income that is not attributable to the spouse.

Schedule III, section 10: Additional amount

CURRENT PROVISION

10. Where the spouse reports income from self-employment that includes the self-employment income for the 12 months ending on December 31 of the reporting year plus an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

ISSUE

The fiscal year of the parent's business may not actually end on December 31, therefore, this provision requires an amendment. Section 10 should also refer to the relevant section of the *Income Tax Act*.

PROPOSED SOLUTION

Remove the reference to December 31 and add reference to the relevant section of the *Income Tax Act*.

CHANGE

10. Where the spouse reports income from self-employment that includes the self-employment income for the 12 months ending on December 31 of the reporting year plus an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

TO

10. Where the spouse reports income from self-employment, **that in accordance with section 34.1 of the *Income Tax Act*** includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

Schedule III, section 13: Employee stock options with a Canadian-controlled private corporation — Disposal of shares

CURRENT PROVISION

13. (1) Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares and any amount paid to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

(2) If the spouse has disposed of the shares during the year referred to in subsection (1), deduct from the income for that year the difference determined pursuant to that subsection.

13. (1) Si, au cours d'une année, l'époux a acquis des actions dans le cadre d'un régime d'options d'achat d'actions d'une société privée sous contrôle canadien, ajouter au revenu de l'année le montant de l'avantage découlant de l'exercice de l'option, lequel est égal à l'excédent éventuel de la valeur des actions au moment où il les a acquises sur le total de la somme qu'il a payée à la société pour ces actions et de la somme qu'il a payée pour l'option.

(2) Si l'époux a vendu les actions au cours d'une année, déduire du revenu de cette année le montant de l'avantage calculé en application du paragraphe (1).

ISSUE

The French and the English versions of subsection 13(2) are not the same. The French version is correct because it covers both the situation when a parent sells the shares in the same year he or she bought them and when he or she sells them in a later year. The English version, however, does not mention the situation in which the parent sells the shares in a later year.

PROPOSED SOLUTION

Change the wording of the English version to make the subsection consistent in both languages.

CHANGE

(2) If the spouse has disposed of the shares during the year referred to in subsection (1), deduct from the income for that year the difference determined pursuant to that subsection.

TO

(2) If the spouse has disposed of the shares during a year, deduct from the income for that year the difference determined pursuant to subsection (1).

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Federal Child Support Guidelines: Reference Manual

**Facilitating Enforcement:
A Federal Perspective**

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(Minister of Justice and Attorney General of Canada)

Facilitating Enforcement: A Federal Perspective*

By Deborah MacNair

INTRODUCTION

With the introduction and passage of *An Act to Amend the Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act* (FOAEA), the *Garnishment, Attachment and Pension Diversion Act* (GAPDA) and the *Canada Shipping Act*, now *Statutes of Canada*, 1997, chapter 1, (formerly Bill C-41), there is renewed interest in the concept of "enforcement" and how, as a result, there can be practical, effective tools to ensure family support and other financial obligations are paid. Beginning with the introduction of GAPDA in 1983,¹ and culminating with the passage of FOAEA in 1986,² the federal government, while assuming a largely facilitative role, has removed some of the barriers which existed previously in order to permit access to funds payable by the federal Crown to individuals. The recent amendments enhance the existing regimes.

The purpose of this paper is to explore how the federal Crown facilitates the enforcement of family support obligations. Enforcement has a different meaning in the federal context to the extent that the legislative schemes, which are the subject of this paper, enhance and strengthen existing provincial and territorial mechanisms rather than act as the primary source of authority for compelling the fulfilment of obligations before the courts.

The federal legislative scheme, which includes GAPDA and FOAEA,³ provides a variety of tools as part of the enforcement network:

- *tracing*;
- *interception* of federal source funds to fulfil family support obligations;
- *garnishment and attachment* of salaries (and certain other monies paid to Crown employees and public officials) to facilitate the enforcement of family support obligations and commercial debts;
- *licence denial*; and
- *diversion* of pension benefits.

¹ GAPDA S.C. 1985, c. G-2, as amended, received Royal Assent on June 22, 1982. Part I was proclaimed in force March 11, 1983. Parts II, III, and IV were proclaimed in force January 1, 1984.

² The Act received Royal Assent on February 13, 1986. Part II of the Act was proclaimed in force November 30, 1987.

³ S.C. 1985, c.4 (2nd Supp.).

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WHAT IS IN THIS PAPER?

After briefly describing the main features of what can be referred to generally as the "enforcement framework," a description of the role of the Department of Justice Canada will then help to provide some context. I intend to highlight the main features of each statute, discuss briefly some of the recent changes that have been added and conclude with a discussion of some of the case law and the relevance of this legislation to the legal profession. While the primary focus will be on the enforcement of support obligations, it is important to keep in mind that GAPDA is also used for the garnishment of commercial debts at the request of a private creditor and for the diversion of pensions.

FRAMEWORK

The Crown is immune from garnishment at common law.⁴ Garnishment⁵ is the legal procedure that facilitates the flow of funds, which are owing to a debtor, to the court for the payment of judgments. The authority for garnishment orders is found generally in the rules of court of each jurisdiction.⁶

The general view is that the *Divorce Act* is silent on support enforcement and therefore contains no process for enforcement.⁷ Similarly, it is not easy, at first blush, to establish if, and how, the common law rules on attachment and garnishment apply to the Crown.⁸

In this section, I will discuss some of the characteristics that are common to both schemes, some of the differences, and then highlight some of the changes which were made in 1997.

FOAEA is designed as a general enforcement tool to provide three services: (1) a tracing service where federal information banks are searched to help locate individuals who have breached family orders or spousal agreements, or their children, and to release information to help with the enforcement of the *Criminal Code* where a child has been abducted; (2) an interception service to capture federal funds⁹ owed by the federal Crown to an individual, such as employment insurance and income tax refunds, to help satisfy support obligations; and (3) licence denial once a test of persistent arrears of support obligations has been met and reasonable attempts by the provincial and territorial enforcement programs have been made.

⁴ C.E.D. (West, 3rd), Title 42, *Crown*, §405. See generally *Palmer v. Hutchinson* (1881) 6 App. Cas. 619; *Bank of Canada v. Scott* [1971] 4 W.W.R. 491, 20 D.L.R. (3d) 728 (N.W.T.S.C.); *C.N.R. v. Croteau* [1925] S.C.R. 384.

⁵ Garnishment orders began in England under the *Common Law Procedure Act*, 1854, s.61.

⁶ The Federal Court Rules also contain a procedure for garnishment. See Sgayias, Kinnear, Rennie and Saunders, *Federal Court Practice* (Toronto: Carswell, 1998) at 706.

⁷ *Divorce Act*, S.C. 1985, c.3 (2nd Supp.) See *Long v. Long* (1993), 1 R.F.L. (4th) 110 (Alta. Q.B.) which held that deduction at source of wages could be used to satisfy support obligations and that subsection 15(2) of the *Divorce Act* provided sufficient authority under "secure and pay".

⁸ Section 54 of FOAEA provided that "no execution shall issue on a judgment given against Her Majesty in garnishment proceedings permitted by this Part".

⁹ The funds are prescribed by regulation.

On the other hand, GAPDA permits the garnishment of money payable to federal public officials in the form of salary and other remuneration for the payment of commercial debts and the diversion of pension benefits for the satisfaction of family support obligations.

There are four characteristics common to both legislative schemes. It is recognized that the enforcement of family support obligations rests with the provinces and territories. However, money owed by the federal Crown to individuals has traditionally been immune from attachment or garnishment, thereby creating a barrier to full recovery. Therefore, the federal regimes add a piece to the enforcement puzzle. Secondly, the FOAEA and the GAPDA are exceptions to the common law rule which prohibits garnishment of the Crown. The objective of both legislative schemes is to provide a mechanism that is facilitative in nature. Thirdly, the individual who owes money is still referred to as a "debtor," whereas in some provinces the individual would be referred to as the "payor." Lastly, both rely on the recognition and incorporation of provincial and territorial garnishment law in order to integrate the procedure and process already in existence, although each statute defines "provincial garnishment law" differently.¹⁰ In order to provide consistency and certainty, there is an override to the effect that the federal statute prevails in the event of an inconsistency.

FOAEA and GAPDA provide for enforcement with the assistance of the federal Crown. In the case of FOAEA, enforcement usually occurs at the request of the provincial or territorial enforcement program (as part of government). In the case of GAPDA, the garnishment process is initiated as a normal debt recovery action for commercial debts or, alternatively, as a family support matter with the help of the same program. It is possible to have an enforcement action under both statutes at the same time. However, the garnishee summons received under GAPDA would be honoured first.¹¹ Existing garnishment processes for other than family support and involving the salary, remuneration and wages of federal officials and employees remain in place.¹²

Money orders for support are the types of family orders that are the primary focus of these mechanisms. The enforcement of property orders is not part of these legislative schemes. Custody and access orders are relevant to the extent that breach of an access right or a custody provision may lead to an application for tracing under Part I of FOAEA.¹³

Some of the rules for recovery of a support or debt obligation are noteworthy. Part I of GAPDA states clearly what salary or other monies are captured once service on the Crown is perfected, in

¹⁰ Section 23 of FOAEA defines "provincial garnishment law" as "means the law of a province relating to garnishment as it applies to the enforcement of support orders and support provisions"; section 2 of GAPDA says "provincial garnishment law" means "the law of general application relating to garnishment that is in force at the time in question."

¹¹ Section 55, FOAEA.

¹² See Rules 1800-1900 of the Federal Court Rules under the *Federal Court Act* S.C. 1985, c. F-7. See C. R. B. Dunlop, *Creditor-Debtor Law in Canada* (2d) (Carswell, Toronto:1995) at pp.718-719 and 746-751 for comments on this issue.

¹³ In section 2, "family provision" means a support provision, a custody provision or an access right.

accordance with the applicable pay periods. Continuing garnishment orders¹⁴ and garnishee summons of continuing effect are still recognized. Garnishment includes "attachment" in order to avoid any confusion arising out of the interpretation of these concepts at common law. A garnishee summons remains in effect for five years for purposes of interception under Part II of FOAEA. This avoids the requirement of renewing a garnishee summons on a regular basis and any potential lapse of funds during a transition period.

Both provincial legislation¹⁵ and the *Divorce Act* provide for the creation of money orders for support. The federal legislative schemes do not distinguish between the two levels of jurisdiction for enforcement purposes. In the case of garnishment, it is the purpose of both statutes to assist with the obligations that are enforceable under provincial law. This includes enforceable obligations under the *Divorce Act*.

In both cases, service of documents must occur within prescribed periods.¹⁶

There are some differences between the two statutes, as they relate to enforcement, which should be noted. There is a limited scheme for priorities in FOAEA.¹⁷ A fee is charged for the processing of every garnishee summons served on Her Majesty. GAPDA does not contain similar provisions.¹⁸

A BRIEF OVERVIEW OF THE CHANGES WHICH BECAME EFFECTIVE AS OF MAY 1, 1997

Process With the passage of the amendments on May 1, 1997, the process for using both statutes is now similar (Part II interception in FOAEA; garnishment of salaries and other remuneration for Part I¹⁹ of GAPDA). In order to start the process, the trigger is service on the Crown of an application in the prescribed form and a garnishee summons. Previously, it was necessary to prepare and serve on the federal Crown a notice of intention within a specified period before serving the summons. This requirement has now been removed.

Definitions and documents In the case of both statutes, the definition of a "garnishee summons" is very broad for the reason that in jurisdictions such as Ontario, there exist documents such as support deduction orders and default need not be established before enforcement occurs.²⁰ There is an additional document, a "judgment or order against the debtor," which must be submitted in

¹⁴ See section 6 of GAPDA; see sections 30-31 of FOAEA.

¹⁵ *Family Law Act*, R.S.O. 1990, c. F. 3, as amended.

¹⁶ See sections 28-29 of FOAEA; see sections 8-10 of GAPDA.

¹⁷ See sections 52 and 55. For relevant Treasury Board policies see <http://www.tbs-sct.gc.ca/> on the Internet.

¹⁸ Section 55 of FOAEA specifies that a garnishee summons received under the other Act does have priority.

¹⁹ The garnishment procedures for National Defence remain unchanged. The notice requirements were removed for the government departments, certain Crown corporations, the Senate and the House of Commons.

²⁰ For purposes of Part II of FOAEA, "garnishee summons" is defined as "includes any document or court order of like import"; in Part I of GAPDA, the "garnishee summons" includes "any document or court order of like import".

the case of GAPDA. The requirement for service of a copy of the order or judgment has been removed in the case of an application under FOAEA.

Something completely new The licence denial scheme for the suspension, revocation and withholding of certain licences was introduced as Part III of FOAEA to address the problem of chronic arrears. With respect to pension diversion under Part II of GAPDA, a court may direct that a former public servant's pension be payable immediately rather than being deferred, as was the case previously. The court must be satisfied that there has been a pattern of no payment and that reasonable steps to enforce payment have been taken. Moreover, more than 50 percent of a net pension benefit may be diverted where provincial or territorial legislation does not provide for a limit and the financial support order is an order or judgment for arrears of the payments.

ROLES AND RESPONSIBILITIES—DEPARTMENT OF JUSTICE CANADA²¹

The federal legislative schemes presuppose two things: that there is a provincial or territorial enforcement service in place (in the case of FOAEA, for all interceptions under Part II; and for the enforcement of support obligations only in the case of Part I of GAPDA), and that there is a common understanding of what constitutes provincial garnishment law. This means, for example, those rules for reciprocal enforcement remain unchanged, as there is no equivalent federal regime. Moreover, the concepts of "pension diversion,"²² "credit splitting"²³ and "pension division"²⁴ are quite different mechanisms, which exist for different purposes.

²¹ See <http://canada.justice.gc.ca> for the Internet site of the Department of Justice; see also the *Department of Justice Act* S.C. 1985, c. J-2.

²² Part II of GAPDA is a unique scheme which applies at the instance of family creditors to capture amounts owing under prescribed superannuation statutes.

²³ Sections 55-55.3 of the *Canada Pension Plan Act* provide for the division of Canada Pension Plan future retirement credits upon marriage breakdown.

²⁴ The *Pension Benefits Division Act* S.C. 1992, c.C-46, Schedule II permits the division of pension benefits owing under the *Public Service Superannuation Act* S.C. 1985, c. P-36 between a public servant and a spouse (or former spouse) in the event of a marriage breakdown.

While the Minister of Justice has complete responsibility for the administration, amendment and implementation of FOAEA, the situation for GAPDA is more complicated. Responsibility for GAPDA is divided between the Minister of Justice and Attorney General of Canada, the Minister of National Defence, the Minister of Finance, the Minister of Supply and Services (now Public Works and Government Services Canada), the Senate and the House of Commons.²⁵

Both FOAEA and GAPDA complement each other with respect to the interception of funds:

- they are built on the premise that neither is an exclusive legislative scheme—they depend on incorporation by reference of provincial and territorial garnishment law;
- neither scheme is dependent on default of existing support obligations;
- if there is an inconsistency between the federal garnishment law and the provincial garnishment law the federal scheme prevails to the extent of the inconsistency;
- both schemes provide for a right which did not exist before at common law—the right to garnish Her Majesty in right of Canada or to require Her Majesty to intercept funds owed to an individual; and
- the Crown may be subject to garnishment, but it is not subject to execution.

GAPDA is the more complex of the two statutes, with respect to its administration within government. Rather than having a central unit which coordinates all of the applications, the Department of Justice notifies the pay offices of each government organization, which then respond to the garnishment request.

²⁵ (a) Minister of Justice and Attorney General of Canada (Part I) (SI/84-5), and for the purposes of sections 46 and 47 of the Act, items 12 and 16 of the schedule to the Act and the other provisions of Part II of the Act as those provisions relate to the *Judges Act*; (SI/84-6)

(b) the Minister of National Defence, for the purposes of the provisions, except sections 46 and 47, of Part II of the Act as those provisions relate to the *Canadian Forces Superannuation Act* and the *Defence Services Pension Continuation Act*; (SI/84-6)

(c) the Minister of Finance, for the purposes of the provisions, except sections 46 and 47, of Part II of the Act as those provisions relate to the *Members of Parliament Retiring Allowances Act*; (SI/84-6) and

(d) the Minister of Public Works and Government Services, for the purposes of the provisions, except sections 46 and 47, of Part II of the Act as those provisions relate to

- (i) the *Governor General's Act*,
- (ii) the *Lieutenant Governor's Superannuation Act*,
- (iii) the *Diplomatic Service (Special) Superannuation Act*,
- (iv) the *Public Service Superannuation Act*,
- (v) the *Civil Service Superannuation Act*,
- (vi) the *Royal Canadian Mounted Police Superannuation Act*, Part I,
- (vii) the *Royal Canadian Mounted Police Pension Continuation Act*, Parts II and III,
- (viii) the *Currency, Mint and Exchange Fund Act*, subsection 15(2) (R.S., 1952, c. 315)
- (ix) the *War Veterans Allowance Act*, subsection 28(10),
- (x) Regulations made under Vote 181 of *Appropriation Act No. 5, 1961*, and
- (xi) the *Tax Court of Canada Act* (SI/84-6)

(Excerpt from the table of Public Statutes, Volume 3, Issue 96-3—updated to December 31, 1996).

For purposes of Part I, which covers the garnishment and attachment of federal salaries and remuneration, including those of Crown contractors and certain Crown corporations,²⁶ there are garnishment registries in the National Capital Region for the Department of Justice, the Senate, the House of Commons and National Defence. In addition, the Department of Justice maintains garnishment registries across the country in various regional offices. With respect to Part II, and the diversion of pension benefits, the main centre for administration is Public Works and Government Services Canada, with the assistance of the Department of Justice legal services.

In the case of FOAEA, the main operational unit is the Family Law Assistance Service at the Department of Justice. With a staff of 14, the manager of the unit coordinates with the provincial and territorial programs and the federal Departments that are the source of the funds or that maintain the databanks for tracing purposes.

WHAT ABOUT THE MINISTER OF JUSTICE?

The Minister of Justice wears "two hats," one as *Minister of Justice* and the other as *Attorney General of Canada*.²⁷ This division in the two roles has an impact on how family law responsibilities are carried out in the Department. While the Minister has overall responsibility for the administration and implementation of the legislation once it is in place, there is also an ongoing review of policy in this area. The Department contributes to the enforcement work done at the provincial and territorial level in several ways:

- Funding is provided through contribution agreements to continue the improvement of enforcement systems.
- The Family Law Committee, consisting of federal, provincial and territorial officials, meets at least twice a year to exchange information and coordinate the development of further initiatives. For example, considerable work has been done in the area of reciprocal enforcement by this group.
- A federal-provincial-territorial task force has been set up to review policy and other issues flowing from the federal Child Support Initiative.
- There is an annual meeting of enforcement program officials to discuss areas of mutual concern.

Any policy initiatives that result in the development of legislation fall within the responsibility of the Policy Sector. Recent amendments to the *Divorce Act* are an example of this type of initiative. Within the Policy Sector, the main policy unit is the Family, Children and Youth Section, which is responsible for ongoing review of family law policy. Custody and access matters are an example of this work.

On occasion, the Department undertakes special initiatives. In recent years you have probably heard of the Child Support Team. This is the multidisciplinary group, composed of policy,

²⁶ See section 12.

²⁷ *Department of Justice Act*, S.C. 1985, c. J-2

program and communications officers, who have been responsible for the development and implementation of the *Federal Child Support Guidelines* and the management of requests for funding.

A second area of family law responsibility falls within the Civil Law and Corporate Management Sector. That is where you will find the Office of Corporate Counsel and the Family Law Assistance Section. The Family Law Assistance Section is responsible for the ongoing implementation of FOAEA and GAPDA. The Central Registry of Divorce Proceedings is also located there.²⁸

While Corporate Counsel is responsible for providing legal services on enforcement issues ranging from the interpretation of the statutes to identifying legal issues as they arise in the development of legislation or the regulations, the Director of the Family Law Assistance Service ensures that the federal interception and garnishment schemes work. This means putting in place the computer systems that manage the data flow to and from the provinces and territories, coordinating all aspects of the operational issues with the provinces and territories, responding to public inquiries, responding to the needs of the provincial and territorial enforcement programs and maintaining an ongoing review of issues that may result in legislative or regulatory change. The Director is responsible for interception and garnishment, whether it is for a support obligation or a commercial debt.

With respect to international law issues, policy matters fall within the responsibility of the International Co-operation Group, the Public Law Policy Section of the Policy Sector and the legal services unit of Foreign Affairs, which is part of the Legal Operations Sector. For example, the legal services unit at Foreign Affairs is the federal central authority of the *Hague Convention on Civil Aspects of International Child Abduction* and they act as a liaison with respect to reciprocal enforcement matters.

In brief, the Department of Justice has a wide variety of responsibilities with respect to enforcement matters and they can usually be divided into the following areas: policy, legal and operational, in both the international and domestic contexts.

AN OVERVIEW OF TWO STATUTES—FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT; GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT

General Comments

Private sector lawyers generally have very little direct involvement with either FOAEA or GAPDA. This is so because the premise for both schemes is that provincial and territorial enforcement services will be the largest user. In Ontario, the former Ontario Support Plan, now

²⁸ It is the Central Registry of Divorce Proceedings which acts as the clearinghouse to ensure the court has jurisdiction to proceed with a divorce petition under section 4 of the *Divorce Act*.

the Family Responsibility Office under the *Family Responsibility and Support Arrears Enforcement Act, 1996* (which came into force in part on May 12, 1997 and September 29, 1997),²⁹ is an example of such a provincial enforcement service. Legal issues arise in the course of family law litigation at the provincial or territorial level and there is no procedure in either statute for adding the federal Crown as a party. Constitutional challenges are brought to the attention of the federal Crown through the well-established procedure for notices of constitutional issues.

Both the federal statutes provide support to the existing provincial and territorial programs and can be used by private litigants.³⁰ Because there are well-established government programs at the provincial and territorial level for the enforcement of support obligations, these programs tend to be the vehicle for making applications for the enforcement of family support obligations.

I will now provide an overview of each of the two statutes.

Family Orders and Agreements Enforcement Assistance Act

As mentioned earlier, this statute is the legal framework for three services: (i) tracing information; (ii) interception; and (iii) licence denial, which are reflected in Parts I, II and III respectively.³¹ There is also a set of general provisions that include, among other things, a provision to protect the release of information and to restrict disclosure for garnishment purposes. This recognizes the sensitivity of the personal information that is being given as part of any application.

Part I—Overview

Part I was designed to be a tracing service in order to provide for the release of information from certain federal information banks (Human Resources Development, National Revenue³² and the Canada Employment Insurance Commission) for three main reasons:

- to help locate a person who is in breach of an order or agreement for support in arrears;
- to help locate children who are missing as a result of the breach of a custody provision; and
- to assist the police in the investigation of a child abduction under sections 282 and 283 of the *Criminal Code*.

The central features of Part I are the following:

- Applications for the release of information are initiated by (1) a spouse, parent or authorized individual or agency, (2) police, or (3) provincial or territorial enforcement services.

²⁹ Bill 82, Ontario News Releases, May 9, 1997 and September 30, 1997.

³⁰ Note that under this new legislation, payors and recipients can opt out of enforcement by the Family Responsibility Office and can enforce support orders themselves. Support deduction orders are enforceable only by the Office if the parties do not opt out.

³¹ The licence denial scheme was introduced as part of Bill C-41 and was effective as of May 1, 1997.

³² National Revenue was added recently with the coming into force of Bill C-41 on May 1, 1997.

- Information will be released directly to the police or the provincial or territorial enforcement services; in other cases the court authorizes an official to receive the information.
- The scheme is dependent on the existence of federal-provincial-territorial agreements which provide for safeguards for the protection of information and the designation of provincial information banks which must be searched before a federal search is conducted.
- The range of orders that qualify under the Act is very broad and includes a support order under the *Divorce Act*, a support provision enforceable in a province or territory and a non-Canadian order which has been registered under reciprocal enforcement legislation.
- Information which is provided is limited to:
 - the address of the individual in arrears, in possession of the children or the subject of a charge for abduction;
 - the name and address of the individual's employer;
 - the address of the child or children; and
 - the name and address of the employer of every child who is the subject of the application.
- If the individual's identity has been changed for security or law enforcement purposes it will not be provided.
- A search is conducted periodically for one year.

Changes to Part I as of May 1, 1997 (Bill C-41)

The main change to note since the amendments were passed on May 1, 1997 is that Revenue Canada has now been added to Part I as a databank that can be searched for information. The existing databanks include those controlled by the Department of Human Resources Development and the Canada Employment Insurance Commission and, therefore, this amendment has opened up the number of information banks available.

Part II—Overview

Part II of the Act is often referred to as the "interception service." The formal heading in the statute reads "Part II—Garnishment of Federal Moneys to Satisfy Support Orders and Support Provisions." Unlike GAPDA, Part I, where the process is similar to traditional garnishment, interception is an act that is not subject to a court process once a completed application is served on the federal Crown.

Part II establishes a process for the interception of monies from specific federal source funds, such as income tax refunds, to facilitate the enforcement of all family law orders and agreements that are enforceable under provincial law. Part II is not limited to child support and it includes support obligations contained in both agreements and court orders.³³ While the enforcement of family orders and agreements is primarily a provincial and territorial responsibility, the Act addresses the reality that spouses who owe support may be receiving federal funds. The Act cannot be used to enforce support obligations on behalf of estates—there must be monies owing to an individual.

³³ See the definition of "support order" and "support provision" in section 23.

The features of Part II that should be highlighted include the following:

- Part II does not apply to all federal monies from whatever source; the source funds are added by regulation and they must be capable of garnishment.
- There is a fee, prescribed by regulation, which must be paid for the processing of each garnishee summons that is served on the Minister. This is an annual amount by instalment, to a maximum amount for five years, which is the life of the garnishee summons. The fee can only be taken from monies owed to a debtor after the fulfilment of the obligations under a garnishee summons. The federal fee exists separately from any fee imposed by a province or territory.
- The language used in the federal legislation is different from that of some of the provincial legislative schemes. For example, it still speaks of a "judgment debtor," in contrast to "payor" in the Ontario legislation.
- The legislative scheme does not presuppose there has been default.
- As with GAPDA, provision is made for the fact that there may be inconsistencies between the provincial garnishment law and Part II and, where that occurs, the federal legislation prevails but only "to the extent of the inconsistency."
- Unlike GAPDA, there is a limited scheme of priorities:
 - the Crown does have a priority for Crown debts and taxes payable to a province where the federal Crown, by agreement, collects the taxes; and
 - in the event that the Crown receives a garnishee summons under both FOAEA and Part I of GAPDA, the latter Act prevails.

Changes to Part II as of May 1, 1997 (Bill C-41)

There is one main change to note. The provincial enforcement services will not have to provide an order to complete an application under section 28. All that will be needed now is an application in the prescribed form and a garnishee summons.

Part III—Overview

Part III established a licence denial scheme for federal passports, aviation and marine licences. This was a completely new measure as of May 1, 1997.³⁴

In announcing the new measures, the Department of Justice indicated that:³⁵

While many parents pay support for their children on time and without fail, there are some that refuse to pay. A newly enacted federal licence denial scheme is aimed at the problem of chronic default.

...

³⁴ Several of the provinces have introduced licence denial schemes for motor vehicle licences. See, for example, the *British Columbia Family Maintenance Enforcement Act*, R. S.B.C. 1996, c.C-127 (in force November 1, 1998).

³⁵ Department of Justice, May, 1997.

At the request of a provincial or territorial enforcement agency, the federal government will suspend or withhold passports and specific federal aviation and marine licences and certificates issued to persons who have failed to meet their support obligations and who are in persistent arrears. The enforcement agency will have to show that other enforcement measures have been tried, but haven't succeeded and the debtor has failed to meet his or her support obligations for three payment periods or has accumulated arrears of at least \$3000.

...
The enforcement agency must also notify the individual in arrears of support that it intends to make a request for licence denial so that he or she has the opportunity to avoid the licence denial actions by making arrangements for payment with the provincial or territorial enforcement agency. The aim of the scheme is to motivate people to pay their support.

Again, as with the other "enforcement" tools, the premise of the scheme is that it will operate at the request of the provinces and territories. Once a request is made, the federal government will take action, which may include suspending, or declining to renew or issue new licences. You should note the following features of the scheme:

- A licence denial application can only be made by a provincial or territorial enforcement service and is not available to private litigants.³⁶
- It is to be used only where the debtor is in *persistent arrears*, which is defined as including any amount due as a result of a failure to make payment in full for any three payment periods or as \$3,000 or more.
- The scheme applies only to passports, as defined in section 2 of the *Canadian Passport Order*,³⁷ and certain aviation and marine licences.
- There is a prescribed procedure to be followed by the enforcement service. An application and an affidavit are sent to the Family Law Assistance Service and the provincial enforcement or territorial service must establish that (1) the debtor is in persistent arrears; (2) other enforcement actions have not succeeded; and (3) the individual who owes support will receive a notice and be given an opportunity to arrange for payment.
- There is no appeal from any action taken.

Garnishment, Attachment and Pension Diversion Act

This statute provides for an exception to the general rule that the Crown is immune from garnishment by permitting the garnishment of federal salaries and other monies, including "fees, honoraria or other payments of like import."

The statute, like FOAEA, consists of two main parts. Part I provides for the garnishment of the Crown and the attachment of salaries and other types of monetary payments, such as severance

³⁶ See section 2 of FOAEA.

³⁷ *Canada Gazette*, Part II, Volume 115, No. 12, SI/81-86, p. 1852.

pay. It is divided into several divisions, one for each of the government departments, the Crown corporations, National Defence, the Senate and the House of Commons. Part II introduced a new concept: the "diversion" of certain pension benefits to satisfy financial support orders and is, therefore, completely different in purpose than Part I.

The purpose of the garnishment procedure under Part I is to satisfy the payment of judgments and orders, including those for family support. Those covered by the Act include federal public servants, judges (federal appointees), members of the Royal Canadian Mounted Police, Members of Parliament (Senators and members of the House of Commons), employees of the Senate, of the House of Commons and of the Library of Parliament. The Crown corporations, which are subject to the statute, are listed in the regulations.³⁸

In contrast to FOAEA, the Act is not limited to the interception of funds for family support.

In addition, it is necessary to become familiar with the provincial and territorial law because under Part I the federal Crown is, for the most part, bound by "provincial garnishment law" for those salaries or other monies paid to individuals who are subject to the Act. "Provincial garnishment law" is defined in section 2 as "the law of general application of a province relating to garnishment that is in force at the time in question." Given the range of exemptions from garnishment of wages and salaries across the country, and the special priority for the payment of family support obligations, the application of the legislation across the country requires extensive knowledge of provincial, territorial and federal law, especially in those cases involving estates and bankruptcy.

Part I—Overview

Part I was developed on the basis that the existing garnishment process would be the foundation of the scheme. Subject to changes which have now been introduced as of May 1, 1997 the main elements are as follows:

- Part I applies to "salaries," as defined, and other remuneration payable in connection with their employment or other services;
- Part I does not apply to corporations (private sector);
- Part I does apply to monies payable to a debtor who is a contractor;
- only certain Crown corporations are subject to Part I; the remainder fall under provincial law; and
- the Armed Forces, the Senate and the House of Commons maintain their own garnishment processes and procedures for purposes of Part I.

Changes to Part I as of May 1, 1997 (Bill C-41)

The requirement for a notice of intention to be served 30 days prior to service of a garnishee summons has been eliminated in the case of government departments and Crown corporations

³⁸ See section 14.

(Division I) and the Senate, House of Commons and Library of Parliament (Division IV). This is consistent with garnishment in private industry and makes the process similar to that used currently under FOAEA.

Part II—Overview

Part II covers the diversion of pension benefits to help satisfy financial support orders. This Part complements Part I to the extent that pensions of the federal public service employees became available for support enforcement purposes.

Some of the noteworthy points about Part II include the following:

- It is similar to Part I of GAPDA and FOAEA because the basic premise is that the province or territory has the primary responsibility for support enforcement; the federal legislation builds on this responsibility in order to provide a separate source of federal funds.
- The application to the Minister of Public Works and Government Services is separate from any action taken under Part I of GAPDA and FOAEA.
- The application for diversion can proceed only where there is a “financial support order” in place. This is defined in section 32 to be an order or judgment for maintenance, alimony or support, with or without arrears made under the *Divorce Act* or provincial legislation.

Changes to Part II as of May 1, 1997 (Bill C-41)

The main changes to highlight are:

- The applicant does not need to be domiciled and ordinarily resident in Canada in order to make an application.
- In certain cases the Minister may deem amounts to be payable immediately so that they can be used to pay arrears.³⁹ This will occur where an applicant applies to a court for an order and satisfies the court that there is an extended pattern of non-payment and the applicant has taken reasonable steps to enforce the financial support order.
- In certain cases amounts in excess of 50 percent may be diverted where the provincial legislation does not have a limit where the order or judgment is for arrears.

³⁹ See sections 35.1-35.4.

OTHER LEGISLATION

There are other statutes, which form part of the enforcement legislative framework:

Pension Benefits Division Act⁴⁰

This Act provides a mechanism for the division of pensions once the parties have reached an agreement or an order has been made, such as under the *Ontario Family Law Act*.⁴¹ The Act applies to a variety of public service pensions, including the pensions provided for under the *Public Service Superannuation Act*,⁴² the *Royal Canadian Mounted Police Superannuation Act*,⁴³ the *Royal Canadian Mounted Police Pension Continuation Act*,⁴⁴ the *Canadian Forces Superannuation Act*,⁴⁵ the *Governor General's Act*,⁴⁶ the *Members of Parliament Retiring Allowances Act*,⁴⁷ the *Special Retirement Arrangements Act*,⁴⁸ the *Diplomatic Service (Special) Superannuation Act*⁴⁹ and the *Defence Services Pension Continuation Act*⁵⁰.

Canada Pension Plan Act⁵¹

This is a scheme that permits a division of pension benefits accumulated during a marriage or common law relationship. It is available upon separation or divorce.

Financial Administration Act⁵²

Subsection 68(5) prohibits the assignment of wages, salary and pay which is payable to federal employees. In other words, applicants must use the existing legislative vehicles in order to gain access to money payable to public officials by way of salary or other remuneration. It is not possible to circumvent the existing mechanisms by obtaining an assignment of wages.

⁴⁰ See previously, footnote 16. For an overview of the *Pension Benefits Division Act* see an article by Catherine D. Aitken, now Justice Aitken, "Pension Benefits Division Act", *Lawyers Weekly*, Volume 14, #39, February, 1995.

⁴¹ R.S.O. 1990, c. F-3.

⁴² S.C. 1985, c. P-36

⁴³ S.C. 1985, c. R-11.

⁴⁴ S.C. 1985, c. R-10.

⁴⁵ S.C. 1985, c. C-17.

⁴⁶ S.C. 1985, c. G-9.

⁴⁷ S.C. 1985, c. M-5.

⁴⁸ S.C. 1992, c. 46 (Schedule I).

⁴⁹ S.C. 1985, c. D-2.

⁵⁰ R.S.C. 1970, c. D-3.

⁵¹ For more information, see *Credit Splitting, A booklet for the Legal Profession*, Human Resources Development Canada.

⁵² See also the *Old Age Security Act*, S.C. 1985, c. 0-9, s. 36; *Public Service Superannuation Act* S.C. 1985, c. P-36, ss. 10(10).

CONCLUSION

Case Law

There has been little case law. However, some guidance can be gleaned from the following cases:

- *Marzetti v. Marzetti*.⁵³ The Supreme Court of Canada concluded that the Director of Enforcement in Alberta was entitled to an income tax refund in priority to a trustee in bankruptcy. The Court concluded wages are not included in the property vested in a trustee under section 67 of the *Bankruptcy and Insolvency Act* and that an income tax refund is in the nature of wages.
- *McGrath Canada Limited v. Lazaar*.⁵⁴ This case has reinforced the principle "first come, first served" in terms of setting out priority for creditors under GAPDA, Part I. In this case, an Ontario summons had been returned unpaid because a Quebec garnishee summons was being paid out and monies under the latter were still outstanding. The Ontario creditor challenged the "first come, first served" policy and asked the Court to order that payment occur on a *pro rata* basis. The Small Claims Court concluded that GAPDA is silent on the issue of priorities and that the Crown can use common law principles to establish them. The court ruled that the Quebec garnishee summons had to be paid out in full before the Ontario summons could be paid.
- *Beattie v. Ladouceur*.⁵⁵ establishes that GAPDA and FOAEA are a complete legislative framework and that this legislation must be used in order to gain access to federal monies.

How are these statutes relevant to the legal profession?⁵⁶

1. While two of the services, including interception under FOAEA, Part II, and garnishment under GAPDA, Part I, usually occur at the request of a provincial or territorial enforcement program, it is possible in some cases for an individual to opt out of the provincial or territorial program. In other words, an individual may want to enforce his or her rights privately. Private enforcement will become increasingly important as provincial and territorial enforcement programs provide for "opting out." There will be a fee imposed by

⁵³ (1991) 82 Alta. L.R. (2d) 67, (1992) 4 Alta. L.R. (3d) 97 (C.A.), 169 N.R. 161 (S.C.C.).

⁵⁴ Action #2565-87, Small Claims Court, Ottawa, Ontario, October 24, 1994, unreported.

⁵⁵ (1995), 23 O.R. (3d) 226 (Ontario Court (General Division)).

⁵⁶ Some useful texts include Paul Lordon, *Crown Law* (Butterworths: Toronto, 1991); C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (Carswell: Toronto, 1995); Wilton and Myauchi, *Enforcement of Family Law Orders and Agreements: Law and Practice* (Carswell: Toronto, as updated).

the federal Crown if a federal garnishment is put in place. The Ontario *Family Responsibility and Support Arrears Enforcement Act*⁵⁷ provides for limited "opting out."

2. Some of the services, including tracing and pension diversion, do not require the intervention of a provincial or territorial enforcement program. In the case of tracing, for example, an individual may make a request, but the court will authorize disclosure to an authorized officer, who is usually a court official. In other cases, such as the licence revocation provisions in Part III of FOAEA, you will need to have the provincial or territorial programs act on your behalf.
3. If your client is a creditor who is trying to satisfy a commercial debt against a federal official or employee, he or she may proceed separately under GAPDA. No fee is imposed for using the federal services of the Garnishment Registry. It is possible to have a federal garnishment in place for both a commercial debt and a family support obligation. It is also possible to have a garnishment action in place under both Acts for a family support obligation.
4. If you are familiar with the range of federal remedies you will be in a position to understand the mandate of the provincial programs, to reduce costs incurred by your client, and to assess whether you will need to proceed under separate legislative schemes in order to help your client. Other remedies, such as pension diversion, are in addition to interception or garnishment and have to proceed independently.
5. You still have to be aware that general prohibitions against attachment of the federal Crown still exist in other statutes. This occurs mainly in the area of benefits. Some examples include the *Employment Insurance Act*,⁵⁸ the *Old Age Security Act*,⁵⁹ the *Public Service Superannuation Act*,⁶⁰ and the *Canada Pension Plan Act*.⁶¹ However, section 24 of FOAEA applies notwithstanding any other Act of Parliament preventing the garnishment of Her Majesty for the enforcement of support orders and support provisions.
6. The federal Crown may still use the set-off provisions provided for in other legislation, including the *Financial Administration Act*⁶² and the *Income Tax Act*.⁶³
7. If your client is a federal employee or official, you should know that there are protections against the arbitrary firing or dismissal from employment. Section 57 of FOAEA provides that no person may be dismissed, suspended or laid off solely on the ground that

⁵⁷ see News Release, Ontario, May 9, 1997. See also, Judith Huddart, "Changes in Support Enforcement: What Our Clients Need Us to Know", (September/October, 1997), Volume 18, No. 9, *Briefly Speaking*, Canadian Bar Association, Ontario.

⁵⁸ S.C. 1996, c. 23, s. 42.

⁵⁹ S.C. 1985, c. O-9, s. 36.

⁶⁰ S.C. 1985, c. P-36, para. 10(10)(c).

⁶¹ S.C. 1985, c. C-8, s. 65.

⁶² See footnote 27, s. 155.

⁶³ See section 224.1.

garnishment proceedings permitted under Part II (interception) have, or may be, taken. A similar protection exists in GAPDA.⁶⁴ In addition, if there is an interception under Part II, the federal Crown cannot disentitle them to, or disqualify them from, future benefits.⁶⁵

8. Recent amendments to the *Bankruptcy and Insolvency Act* provide for certain family support to be treated as a claim provable in bankruptcy.⁶⁶ This is a departure from the common law where it was assumed support orders were not legal debts.
9. You should be aware that there are other federal statutes, such as the *Farm Debt Review Act*,⁶⁷ which may apply where your clients are experiencing financial difficulties and which must be read in light of the federal enforcement scheme.
10. If special initiatives, such as western grain, northern cod or drought relief, are announced by the government and payments are to be made to individuals, the funds can be prescribed by regulation and added to FOAEA.
11. If your client is a member of a specialized profession, you should check both the host statute as well as the main enforcement statutes described in this paper to see if any other enforcement provisions apply to them. For example, as a result of the recent amendments on May 1, 1997, the wages of seamen, as defined under the *Cañada Shipping Act*, are subject to garnishment and attachment if the enforcement is for a "support provision" as defined under section 2 of FOAEA.⁶⁸ Moreover, aviation and marine licences are now subject to the licence revocation scheme in Part III of the latter Act.

⁶⁴ See section 30. See also, the *Canada Grain Act*, S.C. 1985, c. G-10.

⁶⁵ See section 56.

⁶⁶ See S.C. 1985 c. B-3, section 121, as amended by Bill C-5, S.C. 1996, c. 23.

⁶⁷ S.C. 1985, c. F-2.3.

⁶⁸ Section 203 of the *Canada Shipping Act* was amended to permit the garnishment of wages of seamen. Section 2 defines "support provision" as "means a provision of an order or agreement for maintenance, alimony or family financial support and includes any order for arrears of payments thereof."